Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

THOMAS TRUCK LEASE, INC. and
GIBSON CONTAINER, INC.,

Petitioners,

v.

LEE COUNTY, MISSISSIPPI, By and Through Its Former Tax Collector, J.E. MITCHELL, And His Successor In Office, CHARLES DILLARD,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Mississippi, pursuant to Miss. Code Ann. § 27-51-7, levied an unapportioned *ad valorem* tax against tractor trailer trucks operated by the Petitioners in interstate commerce. The Mississippi Supreme Court upheld the tax levy even though the trucks traveled approximately one-half of their total miles outside the State of Mississippi, and despite the fact that the trucks were subject to *ad valorem* taxation by other States. The question presented is:

Whether an unapportioned *ad valorem* tax imposed by a State on instrumentalities of commerce violates Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause).

LIST OF PARTIES

Parties to the proceedings are as follows:

Thomas Truck Lease, Inc. is a Petitioner herein. It is a corporation domiciled in Mississippi. It owns the tractor trucks at issue in this cause.

Gibson Container, Inc. is a Petitioner herein. It is a corporation domiciled in Arkansas, but which is located in Tupelo, Mississippi. It leases and operates the tractor trucks at issue in this cause.

Lee County, Mississippi is the Respondent herein. It is a political subdivision of the State of Mississippi.

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PETITION FOR A WRIT OF CERTIORARI

Thomas Truck Lease, Inc. and Gibson Container, Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Mississippi in this case.

OPINIONS BELOW

The Opinion of the Mississippi Supreme Court is not yet reported. The Opinion of the Mississippi Supreme Court, the Order Denying Motion For Rehearing, the Opinion of the Mississippi Court of Appeals, and the Opinion of the Chancery Court for Lee County, Mississippi are contained within the appendix.

JURISDICTION

The jurisdiction of this Court is invoked by the petitioner pursuant to 28 U.S.C. § 1257(a). The Judgment of the Mississippi Supreme Court was entered on September 30, 1999. The petitioners' Motion For Rehearing was denied on January 27, 2000. This Petition For Certiorari is timely under Rule 13 of the Rules Of The Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 3, which grants to Congress the right to "regulate Commerce . . . among the several States."

Miss. Code Ann. § 27-51-7, which, at the times relevant to this action, provided for the levy of an unapportioned *ad valorem* tax on motor vehicles domiciled in Mississippi. The statute made no allowances for those motor vehicles which were instrumentalities of interstate commerce and traveled a substantial portion of their total miles in interstate commerce, and which were subject to *ad valorem* taxation by other States.

STATEMENT OF THE CASE

The Mississippi Supreme Court has issued an Opinion and Judgment which effectively exempts Mississippi from the Commerce Clause requirement that *ad valorem* taxes imposed on instrumentalities of commerce be fairly apportioned among the different States which have the power to tax those instrumentalities. The rationale of the Mississippi ruling could apply to any other State which wishes to avoid the Constitutional requirement that taxes on such instrumentalities be fairly apportioned. The Petitioners, Thomas Truck Lease, Inc. (Thomas) and Gibson Container, Inc. (Gibson), seek review of that ruling.

Mississippi imposed an unapportioned *ad valorem* tax against thirty-four tractor trucks owned and operated by Petitioners. Thomas owned the trucks at issue and paid the unapportioned tax. Gibson leased and operated the trucks. The trucks were regularly used in interstate commerce. Gibson manufactures corrugated containers at its facility in Tupelo, Mississippi. Gibson regularly delivers its products to customers in fourteen States. Stipulations at trial established that approximately fifty percent of the

miles the trucks traveled during the applicable tax years were in the State of Mississippi, and the other fifty percent of the miles traveled were in the fourteen other States to which the trucks made deliveries. Despite the fact that the trucks were instrumentalities of commerce, and despite the fact that other States imposed *ad valorem* taxes on the trucks based on the miles the trucks traveled through those States, Mississippi refused to adjust its *ad valorem* levy to reflect the limited mileage driven within the State of Mississippi. Mississippi taxed the trucks on the full amount of the trucks' assessed value as if the trucks never left the State.

The plaintiff below was the Tax Collector for Lee County, Mississippi. The plaintiff's Amended Complaint was filed in the Chancery Court for Lee County on January 27, 1994. The tax levy at issue was for the tax years 1988-89, 1989-90, 1990-91, and 1991-92. The Mississippi statutory authority for collection of the unapportioned tax was Miss. Code Ann. § 27-51-7.[1] The Chancery Court attempted to avoid the constitutional issues presented.

---

[1] Prior to 1993, this code section permitted these instrumentalities of commerce to be taxed without apportionment. In 1993, Mississippi, through Miss. Code Ann. § 27-19-143, adopted the International Registration Plan (IRP) to apportion gross receipts tax paid on trucks hauling freight in interstate commerce. Mississippi now properly apportions all taxes on instrumentalities of commerce, including *ad valorem* taxes. This development should not, however, preclude review by this Court. Some States continue to tax such instrumentalities outside the IRP. Alabama, for example, continues to levy an unapportioned *ad valorem* tax on tractor trucks engaged in interstate commerce. *See*, Ala.Code.Ann. § 40-12-253.

That court read the Commerce Clause as prohibiting multiple taxation by different States only where the different States impose their taxes on the "full value" of the instrumentalities. Mississippi, like most States, taxes property on the basis of assessed value. Pursuant to Miss. Code Ann. § 27-35-4(3), trucks are assessed at thirty percent of their true value. The rate of tax is then imposed on the assessed value. Trucks operating entirely within the State of Mississippi are taxed on the same basis. The Chancery Court decided that because Mississippi assessed the trucks at less than full value, the Commerce Clause was not implicated. The Court ruled that Mississippi could levy an *ad valorem* tax against the full amount of the trucks' assessed value without any apportionment whatsoever. The Court ignored the fact that trucks operating in interstate commerce incur other tax liability from other jurisdictions that trucks operating in intrastate commerce do not incur. The Chancery Court entered judgment against the petitioners for $246,078.78 for taxes, interest, and penalties. The Chancery Court was affirmed by an equally divided Mississippi Intermediate Court of Appeals.

The Mississippi Supreme Court affirmed. The Supreme Court agreed that the Commerce Clause was not implicated by the facts of this case. That Court accepted the stipulation regarding mileage traveled outside the State of Mississippi during the applicable tax years and recited the substance of the stipulation in its Opinion. App. 3. Even so, the Mississippi Supreme court stated that "[t]he fact that the tractor trucks were engaged in interstate activity is irrelevant." App. 11. The bulk of the Mississippi Supreme Court Opinion was dedicated to

establishing the uncontested, and obvious, proposition that Mississippi had a right to levy an *ad valorem* tax on the tractor trucks. The Supreme Court went on to conclude, erroneously, that because the trucks were domiciled in Mississippi, and because Mississippi could tax the trucks, no other State could levy a property tax on the trucks. The Court ignored the abundant contrary authority and simply announced that there was no danger of multiple taxation. The Court also upheld the Chancery Court's judgment that taxes on instrumentalities of commerce which are based on an assessed value rather than on true value do not have to be apportioned. The effect of the Supreme Court's Opinion is that Mississippi has exempted itself from the strictures of the Commerce Clause on the incorrect notion that no State other than a domiciliary State can levy a property tax on instrumentalities of commerce, and on the constitutionally meaningless basis that Mississippi levies its *ad valorem* taxes on assessed value rather than on true value.

REASONS FOR GRANTING THE WRIT

I. THE MISSISSIPPI SUPREME COURT IGNORED THE SEVERAL RULINGS BY THIS COURT REQUIRING THAT TAXES ON INSTRUMENTALITIES OF COMMERCE BE FAIRLY APPORTIONED

A. The Mississippi Supreme Court Misapplied This Court's Internal And External Consistency Tests

This Court has repeatedly affirmed the principle that taxes levied on interstate commerce and on the instrumentalities of interstate commerce must be fairly

apportioned to withstand Commerce Clause scrutiny. *See, Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The ultimate goal is to "ensure that each State taxes only its fair share of an interstate transaction." *See, Goldberg v. Sweet*, 488 U.S. 252 260-62 (1989); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). The Court has not attempted to fashion a rigid apportionment formula. Instead, the Court "determine[s] whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *See, Goldberg, supra*, at 260-62. As the Court explained in *Goldberg*, "[t]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. . . . The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 260-62.

The Mississippi Supreme Court misapplied the internal consistency test. The Court quoted the relevant portion of *Goldberg*, but it went on to incorrectly paraphrase the test as asking whether "multiple taxation [would] occur if every state had the same *law* as Mississippi." (emphasis added). The Mississippi Court focused on the laws of other States rather than the taxes of other States. The Court construed Mississippi statutory law as giving Mississippi the exclusive power, as domiciliary State, to tax the trucks. The Court then reasoned that if other States had the same laws, those States would reach the same result as Mississippi and levy ***ad valorem*** taxes only on property of domiciled owners. Under the Court's reasoning, the petitioners, who were not domiciled in other

States, would not be taxed by other States. The Court ignored the fact that *Goldberg* focused on taxation, or potential taxation, by other States rather than the laws of other States. The Court further ignored the fact that other States in fact do tax the trucks to the extent the trucks travel through those States.

In *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 185 (1995) this Court explained that internal consistency exists "when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." It is clear that intrastate commerce will never be subjected to any taxation in other States where the imposition of the tax depends on travel in those other States. It is equally clear that an intrastate truck which is taxed according to a thirty percent assessment will not bear the same tax burden as an interstate truck which pays the same tax based on a thirty percent assessment in addition to *ad valorem* taxes imposed by other States according to mileage in those States. It is indisputable that if other States impose an identical unapportioned *ad valorem* tax against these trucks, the burden of operating in interstate commerce would be substantially greater than the burden of operating the same trucks purely in intrastate commerce. The tax does not come close to passing the internal consistency test.

The Mississippi Supreme Court went on to misapply the external consistency test as well. Again, the Court quoted the language of *Goldberg*, but completely missed the point of the test. The Court contrasted the thirty percent appraisal rate with the fifty percent of miles

traveled in Mississippi and concluded that the Mississippi tax "reasonably reflects the in-state component of the activity being taxed." The Court ignored the reality that Mississippi considers the thirty percent assessment to be the full value of the trucks for purposes of taxation. The thirty percent assessed value is the full taxable value. The thirty percent assessed value is the full value for intrastate trucks as well as interstate trucks. It is the full measure of value which the State applies to trucks which travel every one of their miles on Mississippi highways. If taxation on the full assessed value properly reflects "the in-state component" for intrastate trucks which travel all of their miles on Mississippi highways, such taxation cannot properly reflect the in-state component for trucks which spend half of their time on the highways of other States. Assessed value is not a proxy for apportionment, especially where, as here, the same assessed value is applied to both intrastate and interstate instrumentalities.

The failure of the tax to pass the external consistency test is as complete as its failure to pass the internal consistency test. The unapportioned tax is clearly illegal under the Commerce Clause.

B. The Mississippi Supreme Court Erroneously Determined That Other States Could Not Levy An *Ad Valorem* Tax On The Subject Instrumentalities Of Commerce

The Mississippi Supreme Court took a somewhat dismissive view of the petitioners' jeopardy of multiple taxation. The Court stated that other taxes for road use were

already apportioned, so there was no need to apportion *ad valorem* taxes. The Court further reasoned, implicitly, that because Mississippi is the domiciliary State for the petitioners' trucks, no other situs can be established in other States for *ad valorem* tax purposes. That Court did not consider the ample authority to the contrary.

The proof at trial established that only about one half of the mileage traveled by the petitioners' trucks was inside the State of Mississippi. The remainder was in other States. The proof also showed that at least one Gibson Container truck was in each State which Gibson serviced on virtually every working day of the applicable tax years. Under these facts it is clear that States other than Mississippi can levy and collect an *ad valorem* tax on the trucks.

In *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954), this Court addressed the issue of *ad valorem* taxation on aircraft that traveled in interstate commerce. The specific issue was whether aircraft owned by a non-resident corporation had established a taxable situs in the State of Nebraska. The proof in that case showed that some aircraft belonging to the non-resident corporation landed in Nebraska every day, but none of the aircraft was continuously within the State, and the same aircraft did not visit the State every day. This Court held that regular contact with a State was sufficient to establish a situs in that State for purposes of *ad valorem* taxation. The key was the fact that the aircraft were habitually employed within the State. The testimony at the trial of the present cause showed that some of the Petitioners' trucks were in the State of Alabama every working day of the 1988-92 tax period. It

would not necessarily be the same trucks every day, but part of the petitioners' fleet was in Alabama every day. Clearly, as in *Braniff*, the Petitioners' trucks were habitually employed in States other than Mississippi, the domiciliary State. It is equally clear that States other than Mississippi are able to levy *ad valorem* taxes against those trucks. As this Court has explained, the mere "risk" of multiple taxation is enough to bring a tax within Commerce Clause scrutiny. *See, Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980).

Beyond the theoretical potential for such taxation, the Mississippi Supreme Court ignored the fact that at least one other State was actually levying *ad valorem* taxes against the trucks. The testimony was clear that Alabama levied an *ad valorem* tax on the trucks, and that Thomas Truck Lease paid the tax to Alabama. The Mississippi Supreme Court was wrong on both the law and the facts. The Petitioners' trucks are subject to other States' *ad valorem* taxes. Mississippi cannot, therefore, levy an unapportioned *ad valorem* tax against those trucks.

II. The Question Presented Is Important And Should Be Reviewed By This Court

The contiguous forty-eight States have adopted a multi-state agreement known as the International Registration Plan (IRP). The IRP serves to apportion taxes levied against trucks operating in interstate commerce. Under the IRP, a company such as Gibson Container, Inc. is required to register its fleet of trucks only in its "base jurisdiction." When the company registers the fleet and purchases truck tags it submits information such as

weight, value, and miles traveled in different States. Taxing authorities share information regarding tax levies and maintain schedules showing levies for all States through which a particular vehicle travels. Based on the figures submitted by the fleet owner, the base jurisdiction derives an apportionment formula and makes a proportional distribution of tax receipts to all the other jurisdictions through which the fleet will travel. The result is fairly apportioned taxes. Mississippi entered the IRP in 1993, pursuant to Miss. Code Ann. § 27-19-143. The Mississippi *ad valorem* tax at issue is presently levied within the IRP. The scenario presented by this case will not be repeated in Mississippi so long as Mississippi continues to levy its *ad valorem* tax within the IRP.

Unfortunately, some taxes against trucks engaged in interstate commerce are still levied outside the IRP. Alabama, for instance, levies its *ad valorem* tax on such trucks outside the IRP. *See*, Ala.Code.Ann. § 40-12-253. The Mississippi Supreme Court's decision is calculated to avoid the Constitutional requirement of apportionment of taxes on instrumentalities of commerce. The practice of taxing such instrumentalities outside the IRP is a deliberate attempt by the taxing authority to do the same thing. The facts of this case will be repeated continuously so long as jurisdictions such as Alabama, or other States, continue to collect *ad valorem* taxes outside the IRP without apportionment. Mississippi could withdraw its *ad valorem* taxes from the IRP at any time.

Besides the opportunity to correct the clear Commerce Clause violation sanctioned by the Mississippi Supreme Court and suffered by the Petitioners herein, the present case presents an opportunity for this Court to

address the lingering attempts by various jurisdictions to wrongfully levy unapportioned taxes against instrumentalities of interstate commerce. This Court has consistently attempted to give force to the Constitutional insulation of interstate commerce against wrongful, discriminatory taxation by States. The Court's efforts have been hugely successful in removing the various major impediments to the free flow of commerce between States. The very existence of the IRP is largely the result of this Court's dedication to the Commerce Clause. This case presents an important opportunity for this Court to cast a finer net and address the smaller, but equally illegal, impediments that are still being constructed by some States.

CONCLUSION

The Mississippi Supreme Court has sanctioned an illegal tax against the Petitioners. In doing so it has flaunted the Constitution and the several decisions by this Court dealing with the issue. This Court should issue its Writ of Certiorari to the Mississippi Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-CT-00745-SCT

THOMAS TRUCK LEASE, INC.
AND GIBSON CONTAINER, INC.

v.

LEE COUNTY, MISSISSIPPI,
BY AND THROUGH ITS
FORMER TAX COLLECTOR, J.E.
(BILL) MITCHELL AND
HIS SUCCESSOR IN OFFICE,
CHARLES DILLARD

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	04/20/95
TRIAL JUDGE:	HON. TIMOTHY E. ERVIN
COURT FROM WHICH APPEALED:	LEE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS:	ROBERT L. WELLS
ATTORNEY FOR APPELLEE:	WILLIAM M. BEASLEY
NATURE OF THE CASE:	CIVIL – OTHER
DISPOSITION:	AFFIRMED – 9/30/1999
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

PITTMAN, PRESIDING JUSTICE, FOR THE COURT:

¶1. J.E. (Bill) Mitchell, in his capacity as Lee County Tax Collector, filed suit against Thomas Truck Lease, Inc. (Thomas) and Gibson Container, Inc. (Gibson) in the Lee

County Chancery Court in 1991, claiming that the defendants owed ad valorem taxes. After a trial the chancery court found that Thomas and Gibson owed $246,078.78 in ad valorem taxes to Lee County and entered judgment accordingly. Thomas and Gibson appealed this final judgment to this Court, which assigned the case to the Court of Appeals. The Court of Appeals affirmed the judgment of the chancery court. This Court granted certiorari to consider the constitutional implications of the taxes levied in this case. After consideration, we find that the taxes are constitutional, and we affirm the judgment of the Court of Appeals.

FACTS AND PROCEEDINGS BELOW

¶2. Gibson Container, Inc. (Gibson), an Arkansas corporation, is a manufacturer and distributor of cardboard boxes. During the period relevant to this action, all of its administrative and production facilities were located in Lee County, Mississippi. Thomas Truck Lease, Inc. (Thomas), is an Alabama corporation, engaged in the business of leasing tractor trucks. Its principal place of business is maintained in Columbus, Lowndes County, Mississippi. It also has an office in Alabama.

¶3. On March 14, 1988, Thomas entered into a lease contract with Gibson and under which Thomas was to lease to Gibson for a four-year period several vehicles (tractor trucks) to use in the distribution of Gibson's product. These vehicles all carried Alabama license tags. Thomas owned land and a building in Lee County, where it maintained, fueled, repaired and stored or garaged all the trucks it leased to Gibson. Generally, all of Gibson's

trucks were within the Thomas compound at the end of each day. None of the vehicles were ever stored at Thomas's Alabama location or at Gibson's Arkansas office. Approximately 50% of the miles traveled by the trucks in question was in Mississippi.

¶4. In Paragraph 5A of the lease contract, Thomas specifically agreed "to provide or pay for the state motor vehicle license for the licensed weight shown on schedule A and personal property taxes for each vehicle in the state of domicile. . . . " The agreed domicile for the leased vehicles, as set out in schedule A of the lease contract, was Tupelo, Mississippi. Under the lease contract, Thomas agreed to indemnify Gibson for any loss as to the tax question raised in this case.

¶5. J.E. "Bill" Mitchell, as Tax Collector of Lee County, Mississippi, subsequently demanded payment from Thomas of ad valorem taxes on the vehicles leased by it to Gibson, and domiciled in Lee County, Mississippi. Taxes, penalties and interest were assessed against Thomas for the years 1988-89, 1989-90, and 1990-91. The ad valorem tax was assessed against 30% of the value of the trucks. *See* Miss. Code Ann. § 27-35-4(3) (1995). When Thomas failed to pay the taxes, Mitchell filed suit in Lee County Chancery Court in February 1991. Thomas defended on the basis that (1) the vehicles in question were not domiciled in Lee County; (2) Mississippi was a member of the International Registration Plan ("IRP"), an interstate treaty, and that all ad valorem taxes owed were paid under this plan in the State of Alabama where the defendant was domiciled; (3) the tax was unapportioned

and violated the Commerce Clause of the U.S. Constitution; and (4) Thomas was entitled to tax amnesty under Miss. Code Ann. § 27-19-11.

¶6. At trial three IRPs, or Plans, were introduced: Exhibit 9, shown as reorganized and adopted in April 1988 and dated October 1992, apparently the Plan in use by the Tax Commission at the time of the trial; Exhibit 43, shown as adopted September 13, 1973 and revised as amended March 1, 1984, the plan which had preceded Exhibit 9; and Exhibit 8, shown as being reorganized and adopted April 1988. Exhibit 8 was different than Exhibit 9 in that Exhibit 8 defined base jurisdiction for a rental vehicle in Article II Section 1111 as "the jurisdiction from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled." The same section in Exhibit 9 states:

> The 'base jurisdiction' definition in Section 210 of Article II applies under this Article and the conditions therein specified must be met by the rental company as registrant of the fleet; except where the rental agreement is for more than sixty (60) days, the rental customer must have an established place of business and his fleet must accrue miles in the jurisdiction selected as the base jurisdiction for the registration year.

Section 210 under Exhibit 8 and 9 is worded as follows:

> "Base jurisdiction" means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained

or can be made available in accordance with the provisions of Section 1602

¶7. At trial, W.L. Burkes, department supervisor in charge of supervising apportionment, or the International Registration Plan, for the Mississippi State Tax Commission, testified as to how the IRP operated in Mississippi. Burkes stated that his supervisor, in 1983, showed him what was supposedly a signed document of when Mississippi entered the IRP. It was his understanding that it was signed by the Attorney General. Burkes had never received a copy of the document and possessed no documents which indicated that Mississippi had adopted the IRP. Burkes said the plan itself showed an entry date of November 1, 1975. Burkes had never received a copy of Exhibit 8. Burkes also had no document stating that the current plan, Ex. 9, and its amendments, had been adopted by the appropriate state officials.

¶8. At trial, Frank McCain, Director of the Revenue Bureau of the Mississippi State Tax Commission since 1984, testified that he oversaw the general administration of the International Registration Plan. McCain also served on the Board of Review for taxpayer appeals. Both McCain and Burkes, and the parties for that matter, agreed that the State Tax Commission, properly adopted or not, had been operating under the IRP since 1975.

¶9. The chancery court found that the trucks were taxable property, domiciled in Lee County, and as such, Lee County was justified in collecting an ad valorem tax on the trucks. The court found that the tax did not violate the Commerce Clause of the Constitution. The court

noted that the State of Mississippi imposed a number of taxes on motor vehicles:

> For ease of collection, ad valorem taxes on motor vehicles are paid annually at the same time that a license or tag is purchased. The law in Mississippi, for a number of years, has required a resident operating a tractor-trailer truck to pay ad valorem taxes in the county where the 'owner' was located, and then obtain his license or tag from the State Tax Commission on an apportioned basis if used in interstate commerce. Out-of-state or 'foreign registered' vehicles only pay their apportioned share of road, bridge, use and privilege taxes.

The court found that Thomas was being treated the same as "all resident domiciled entities that keep and use property subject to ad valorem taxation in Lee County, Mississippi." The court noted that the rationale of the Commerce Clause argument was that an interstate instrumentality should not be subjected to more than one tax on its full value. The court stated that this was not happening, as other taxes such as road use were being apportioned. The chancery court also noted the existence of the International Registration Plan, but stated that this was irrelevant to the fact that the trucks in question had been wrongfully registered in Alabama. The court further found that Thomas failed to prove that Mississippi had legally entered into any such plan under Miss. Code Ann. § 27-19-143. The chancery court entered judgment in favor of Lee County for $246,078.78.

¶10. A divided Court of Appeals affirmed. The majority agreed with the chancery court's findings as to the domicile of the trucks in question was Lee County, based on

the facts of the case and the contract between Gibson and Thomas. The majority further found that there was insufficient proof that Mississippi had joined the International Registration Plan, or which of several plans was the actual Plan in question.

¶11. The two dissenting opinions both found that the taxation scheme which Lee County was attempting to apply to Thomas and Gibson was unconstitutional. The second dissenting opinion attempted to find a constitutional interpretation of the statutes, stating that Thomas had acted legally, and because it had tagged its trucks in Alabama and paid an ad valorem tax there, there was nothing in the Mississippi statutes which required it to pay such a tax, however apportioned, in this State. All parties agree that the taxing scheme which led to this case was amended in 1993 to eliminate this problem.

DISCUSSION OF LAW

¶12. "Our limited review of the chancellor's findings of fact is the familiar manifest error/substantial evidence rule. We review law application de novo and our scope of review is plenary." ***Mississippi State Tax Com'n v. Medical Devices, Inc.***, 624 So.2d 987, 989 (Miss. 1993).

¶13. Thomas's argument is that until the tax laws were amended in 1993, the state's tax laws were discriminatory against trucks traveling in interstate commerce. Thomas states that this was not a problem because the application of the laws resulted in trucking companies tagging their trucks in another state, and then paying an apportioned road and bridge privilege tax in this state, thus avoiding the ad valorem tax. According to Thomas, this was done

under the IRP. Thomas emphasizes that it had offices in Alabama, tagged its trucks in Alabama under the IRP, paid its unapportioned ad valorem tax in Alabama, and then paid the apportioned tax of all other applicable states through the Alabama offices in charge of IRP.

¶14. Lee County's argument is that by statute (Miss. Code Ann. § 27-19-3) and contract the domicile of the trucks was in Lee County, and whatever Thomas Truck did outside the State of Mississippi in an effort to avoid Mississippi ad valorem taxes is irrelevant to its effort to collect those taxes. Section 27-19-3 states in part:

> Leased vehicles shall be considered as domiciled at the place in the State of Mississippi from which they operate in interstate or intrastate commerce, and for the purposes of this article shall be considered as owned by the lessee, who shall furnish all insurance on the vehicles and the driver of the vehicles shall be considered as an agent of the lessee for all purposes of this article.

Lee County argues that the ad valorem tax is properly apportioned, because Mississippi, as any other state, can impose the tax on property domiciled within its borders.

¶15. This Court described the International Registration Plan in ***Mississippi State Tax Com'n v. Trailways Lines, Inc.***, 567 So.2d 228, 229 (Miss. 1990) as follows:

> The IRP is a multi-state proportional registration agreement for vehicles. Under the IRP, vehicle registration fees are apportioned among the member states in which the vehicle travels. The fees paid to each state are based on an

apportionment formula. The formula is determined by computing the percentage of miles traveled in the state as compared to the total miles traveled throughout the country. For example, if a vehicle traveled a total of 10,000 miles and 1,000 of those miles were in Mississippi, the apportionment formula would be 10%. Thus, the owner of the vehicle would be required to pay 10% of the registration fee normally due in Mississippi.

Prior to the adoption of the IRP, a vehicle traveling through Mississippi was required to pay the full registration fee unless the State had a reciprocity agreement with the vehicle's base jurisdiction. If a reciprocity agreement existed, the vehicle paid the full registration fee due in its base jurisdiction, and Mississippi received nothing.

¶16. Thomas asserts that the ad valorem tax in question is unconstitutional based upon the Commerce Clause of the United States Constitution, specifically the "fairly apportioned" prong of the four-part test laid out in ***Complete Auto Transit, Inc. v. Brady***, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (U.S.Miss., 1977). Thomas's reliance upon ***Complete Auto*** and the issue of fair apportionment is completely misplaced in this specific instance. This case is clearly one of state statutory application and is not controlled by the Commerce Clause. The ability of the state to levy an ad valorem property tax against property, whether or not engaged in interstate commerce, domiciled within the state is without dispute. ***See Northwest Airlines v. State of Minnesota***, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (U.S.Minn., 1944); ***See also People of State of New York ex rel. New York Cent. & H.R.R. Co. v.***

Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155 (U.S.N.Y., May 28, 1906). The fact that a case decided over fifty years ago is still controlling evidences that the law in this area is well settled.

¶17. In *Northwest*, the state of Minnesota sought to assess a property tax against a fleet of airplanes domiciled in Minnesota and engaged in interstate commerce. Northwest argued that the Commerce Clause barred the application of this personal property tax. Justice Frankfurter, writing for the plurality, found that the tax was:

> . . . not a charge laid for engaging in interstate commerce or upon airlines specifically; it is not aimed by indirection against interstate commerce or measured by such commerce. Nor is the tax assessed against planes which were 'continuously without the state during the whole tax year,' New York Central & H.R. R., Co. v. Miller, 202 U.S. 584, 594. . . .

Northwest, 322 U.S. at 294. Justice Frankfurter went on to assert that the relationship between Northwest and Minnesota was the constitutional foundation upon which the taxing power of Minnesota was based. *Id.* The taxing situs or permanent location was the decisive factor, and thus, the doctrine of tax apportionment was not applicable in this instance. *Id.* at 295-7.

¶18. Further, the Court held that the power of the domiciliary state to levy property taxes is not abridged even if Northwest paid some property tax on the full value of the instrumentality in another state. 322 U.S. at 295. Nor would the fact that an instrumentality did not spend all of its time in one state affect the rights of the domiciliary state:

> Surely, the power of the State of origin to 'tax its own corporations for all their property within the state during the tax year' cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not 'continuously without the state during the whole tax year'. . . .

322 U.S. at 299 (quoting *New York Central*, 202 U.S. at 594).

¶19. The taxing power of the domiciliary state has a very different basis from the constitutional basis for tax apportionment in situations focusing on interstate commerce. The power of the domiciliary state derives from the simple and uncontroverted fact that it is the state of domicile, a privilege enjoyed by no other state. 322 U.S. at 297.

¶20. The reasoning used in *Northwest* is applicable in the instant case. Mississippi as the domiciliary state has the right as such to levy an ad valorem property tax against Thomas. The fact that the tractor trucks were engaged in interstate activity is irrelevant. Likewise, the argument that the ad valorem tax is not fairly apportioned is without merit. Justice Frankfurter makes the point well:

> To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. . . .

Northwest, 322 U.S. at 299-300. The present case is strictly one of Mississippi statutory application and does

not in any way encroach upon the rights guaranteed by the Commerce Clause.

¶21. Even assuming arguendo that the constitutionality of the ad valorem tax must be analyzed under the Commerce Clause, the tax is constitutional. It should be noted that the ad valorem tax in question would only be scrutinized under the Commerce Clause if the "true value"[1] of the instrumentality (tractor truck) was determined based upon receipts from interstate commerce. If such receipts were considered in setting the "true value" of the instrumentality, then the ad valorem tax would be tested for fair apportionment concerning the out-of-state receipts derived from interstate commerce. ***See Railway Exp. Agency v. Com. of Va.,*** 347 U.S. 359, 74 S.Ct. 558, 98 L.Ed. 757 (U.S.Va., 1954).

¶22. Thomas did not contend that the ad valorem tax was not fairly apportioned based upon the setting of the "true value" of the tractor trucks. For this reason, no evidence was presented showing how such "true value" was determined.

¶23. Thomas argues that Lee County's attempt to collect the ad valorem tax in question is unconstitutional. It cites ***Complete Auto*** for the following four-part test which must be met in order for a tax to survive a Commerce Clause challenge. The tax must be:

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[1] An ad valorem tax assessed against 30% of the true value of the tractor truck is to be levied as required by Miss. Code Ann. § 27-35-4(3). The true value is to be determined using a combination of three approaches set out in Miss. Code Ann. § 27-35-50(2).

(1) applied to an activity with a substantial nexus with the taxing state;

(2) fairly apportioned;

(3) non-discriminatory against interstate commerce, and

(4) fairly related to the services provided by the state.

Thomas stated that only (2), fair apportionment, is at issue here. The United States Supreme Court discussed the apportionment requirement in ***Goldberg v. Sweet***, 488 U.S. 252, 260-62, 109 S.Ct. 582, 102 L.Ed. 607 (U.S.Ill., 1989):

> [T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. *See, e.g.*, ***Container Corp. of America v. Franchise Tax Bd.***, 463 U.S. 159, 169 (1983). But "we have long held that the Constitution imposes no single [apportionment] formula on the States," ***Id.***, at 164, and therefore have declined to undertake the essentially legislative task of establishing a "single constitutionally mandated method of taxation." ***Id.***, at 171; *see also* ***Moorman Mfg. Co. v. Bair***, 437 U.S. 267, 278-280 (1978). Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. ***Scheiner***, *supra*, 483 U.S., at 285; ***Armco Inc. v. Hardesty***, 467 U.S. 638, 644 (1984); ***Container Corp.***, *supra*, 463 U.S., at 169-170.
>
> To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would

> result. 463 U.S., at 169, 103 S.Ct., at 2942. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. . . .
>
> . . . .
>
> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. ***Container Corp.***, *supra*, 463 U.S., at 169-170. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. . . .

¶24. Miss. Code Ann. § 27-19-11 provides for a highway privilege tax to be levied on carriers of property (tractor trucks) in accordance with a set schedule based on weight. This highway privilege tax is also known as a road and bridge privilege license tax. Miss. Code § 27-51-7 provides that anyone who must pay a road and bridge privilege tax license on any motor vehicle must also pay an ad valorem tax on that motor vehicle as well. These statutes must be viewed in conjunction with § 27-19-57, which states in part:

> All persons required to pay the privilege license prescribed by this article shall register their private or commercial vehicle and pay such tax in the county in which such vehicles are domiciled or the county from which such vehicles most frequently leave and return.

¶25. The internal consistency test asks would multiple taxation occur if every state had the same law as Mississippi, an ad valorem tax on property domiciled within the state. The answer is no. Since vehicles can only be domiciled in one location, the result would be only one tax, not multiple taxation. The problem has arisen in this case because Mississippi, in the case of trucks, had at the pertinent time a higher ad valorem tax than other neighboring states. Thomas attempted to escape that by tax tagging its fleet in Alabama. If there was multiple taxation, it was caused by Thomas and not by any unfairness in the Mississippi law.

¶26. Although the ad valorem tax may be internally consistent, it must also satisfy the test for external consistency. To be externally consistent, a state can tax "only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." ***Goldberg,*** 488 U.S. at 262. This is essentially a test focusing on the "practical or economic effect of the tax on that interstate activity." ***Id.*** At its simplest, the inquiry for external consistency is whether the state collected too much money in this specific instance. We find that a tax against 30% of the value of trucks traveling approximately 50% of their miles in Mississippi reasonably reflects the in-state component of the activity being taxed. We find that the tax in question meets the test of ***Complete Auto.***

¶27. Thomas and Gibson failed to prove that this State formally entered into any International Registration Plan. Miss. Code Ann. § 27-19-143 (1995) states:

The Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, the Attorney General and the Governor are hereby authorized and empowered to negotiate, enter into and promulgate reciprocity agreements and compacts with other states and the Dominion of Canada or its provinces, through their respective enforcement divisions, concerning the operation of all motor vehicles, properly registered in such other state upon and over the public highways of the State of Mississippi, in foreign or interstate commerce, without the payment of the privilege license tax provided for in this article, provided that the state with which such agreement is entered into extends like privileges to vehicles properly registered in the State of Mississippi; and provided further, that such agreements or compacts shall not suspend any laws, rules or regulations of this state other than the requirements of the payment of the privilege license tax provided for in this article by residents of such other states.

It is further provided that the Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, the Attorney General and the Governor may likewise enter into agreements with the duly authorized representatives of other jurisdictions relating to the proportional registration of commercial vehicles in interstate or combined interstate and intrastate commerce. The apportionment may be made on a basis commensurate with and determined on the miles traveled on and use made of the highways of this state as compared with the miles traveled on and use made of other jurisdictional highways or any

other equivalent basis of apportionment. It is also provided that the Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, may collect proportional registration fees due other member jurisdictions and deposit such fees in a special holding fund until the fees may be properly distributed by the Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, to the jurisdiction, including Mississippi, for which such fees have been collected. The Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, the Attorney General and the Governor may adopt and promulgate such rules and regulations as shall be necessary to effectuate and administer the provisions herein contained.

It is further provided that the terms of all reciprocity agreements or compacts entered into under the provisions of this section shall, insofar as they relate to common or contract carriers of property, private commercial carriers of property, or common or contract carriers of passengers, be based upon the terms and provisions of Sections 27-61-1 through 27-61-29, and no person shall be entitled to the benefit of the terms and provisions of such agreements and compacts unless and until he fully complies with the requirements, terms and provisions of said Sections 27-61-1 through 27-61-29. The Chairman of the State Tax Commission or any individual or agency who, or which, shall accede to his duties, Attorney General and Governor shall have the power to cancel and abrogate any agreements or compacts entered into under the terms of this section or under any

> other law heretofore effective, by giving thirty (30) days' notice, in writing, to the enforcement authority of the state with which such agreement was entered into.

The State Tax Commission employees who testified in this case were unable to present documentary evidence showing that § 27-19-143 had been complied with as to the IRP. Given this failure of proof, the IRP claim asserted by Thomas and Gibson is without merit.

CONCLUSION

¶28. We find no error in the Court of Appeals' decision. The judgment of the Court of Appeals is affirmed.

¶29. **AFFIRMED.**

SULLIVAN, P.J., McRAE, WALLER AND COBB, JJ., CONCUR. PRATHER, C.J., DISSENTS WITH SEPARATE WRITTEN JOINED BY BANKS, SMITH AND MILLS, JJ.

PRATHER, Chief Justice, Dissenting:

¶30. It is my view that the law applicable to the present case permitted Thomas Trucking to register its vehicles in Alabama without being subjected to Mississippi taxes during the years 1988-91, and I must therefore respectfully dissent.[2] This Court is interpreting a statutory scheme that no longer exists. Whatever the interplay might have been prior to July 1, 1993, between the *ad*

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[2] This dissent incorporates many of the arguments and language set forth in Court of Appeals Judge Southwick's dissent.

valorem taxation statutes, the motor vehicle registration statutes, certain interstate compacts, and the other relevant rules, those relationships have been supplanted by the present version of Mississippi Code Sections 27-19-11 (privilege taxes), 27-51-41 (exemptions) and other statutes.

¶31. Nevertheless, as will be seen, the nature of the 1993 statutory amendments strongly suggests that, prior to these amendments, Thomas Trucking was within its rights in choosing to tag its trucks in Alabama in order to escape the higher Mississippi rates. It is apparent that the Legislature saw fit to modify the law which led to this practice, but Thomas Trucking was within its rights in relying on the law as it existed at the time.

¶32. Before discussing the 1993 amendments, I will first address the constitutional issues. The Lee County Tax Collector alleges here that the tax is constitutional because it is assessed only on 30% of the full value of the vehicles. This assessment arises from statute, whereby all motor vehicles are assessed at that percentage. Miss. Code Ann. § 27-35-4(3) (1995) (rate of assessments). This certainly is not an apportionment. It appears that the Tax Collector is not arguing that it is. All motor vehicles, whether interstate or intrastate in their use, are assessed at that percentage.

¶33. Whatever the assessment percentage, the constitutional problem arises from an interstate vehicle being subjected to higher taxes than its intrastate "cousins." Vehicles pay the same taxes based on the same percentage assessment in Mississippi, but Thomas Truck's vehicles are also subject to taxation elsewhere. Interstate vehicles

being assessed at the same percentage of full value as intrastate vehicles means that the interstate vehicles are subject to multiple and higher taxation in the total number of jurisdictions that have power to tax them. That is the constitutional defect.

¶34. If it is possible "a court should construe statutes so as to render them constitutional . . . after first resolving all doubts in favor of validity." ***City of Oxford v. Northeast Mississippi Elec. Power Ass'n.***, 704 So.2d 59 (Miss. 1997) (quoting ***Loden v. Mississippi Public Serv. Comm'n,*** 279 So.2d 636, 640 (Miss. 1973)). The construction must not give violence to the words, but must be a reasonable interpretation of the intent of the legislature. ***Grace v. Department of Human Serv.***, 687 So.2d 1232, 1234 (Miss. 1997). The majority concludes that, if Mississippi is the domiciliary State for the vehicles in question, then we can properly ignore the taxing authority that other States have regarding them. Since I find that the majority's interpretation would make this statute unconstitutional, I discuss what I find to be the reasonable and constitutionally valid interpretation of the statute.

¶35. The tax obligation in the present case arose from this language: "[a]ny person required by law to pay a road and bridge privilege tax on any motor vehicle shall also be liable for the *ad valorem* taxes due on such motor vehicle, unless otherwise specifically exempted herein." Miss. Code Ann. § 27-51-7 (1995) (persons liable for ad valorem taxes.) Determining the county of domicile of a vehicle does not define the obligation, but merely establishes where the taxes are paid if they are due. *See also* Miss. Code Ann. § 27-19-57 (1995) ("persons required to pay the privilege license prescribed by this article shall

register their . . . vehicle and pay such tax in the county in which such vehicles are domiciled. . . . "). If the privilege license must be purchased and the owner acquires one in the wrong county, a penalty is assessed. *Id.*

¶36. The road and bridge privilege tax obligation is the next element of the analysis. Only if Thomas Trucking were required by law to pay Mississippi's road and bridge privilege tax could it be made to pay Lee County's *ad valorem* tax. When the privilege tax is paid, the vehicle is issued a license plate or a decal for an existing plate signifying the privilege of operating the vehicle for a year. Miss. Code Ann. §§ 27-19-11 & 27-19-31 (1995). It is here that Thomas Trucking and the county join issue: did Thomas Trucking have to tag its vehicles in Mississippi?

¶37. One of the previously applicable statutes established the amount of the highway privilege tax, but the statute did not define who was to pay it. Its language was only that on "each carrier of property, for each motor vehicle, truck-tractor or road tractor used in the operation of any business as such, there is hereby levied an annual highway privilege tax" in accordance with the fee schedule that followed. Miss. Code Ann. § 27-19-11 (Supp. 1987) (codifying 1987 Miss. Laws ch. 322, § 21).

¶38. In fact, the parties have pointed us to no statute that specifically defines which vehicles are to pay the road and bridge privilege tax. To operate on the roads of Mississippi motor vehicles must be tagged somewhere. Vehicles entering the State briefly to take advantage of Mississippi attractions do not pay our tax. Other vehicles whose drivers do not stop at all do not pay our tax. The

tax collector no doubt assumes that such transient vehicles domiciled elsewhere do not pay the tax, but that any vehicle that arguably is domiciled here has to pay Mississippi's road and bridge tax. Such payment then obligates a payment of the *ad valorem* tax.

¶39. However, I find no such rule in the statute. Could the owner of a vehicle that is principally located in Alabama pay the highway and bridge privilege tax in Mississippi and be issued a tag? There is nothing in the statute that prevents it. In our case, the opposite happened. A Mississippi-domiciled vehicle was tagged in Alabama. What Thomas Trucking needed for its vehicles was a tag or license. By not getting such a tag in Mississippi but instead acquiring one in Alabama, Thomas Trucking argues that it fulfilled its obligations for operating on Alabama, Mississippi and all other highways. If that is true, that is, if Thomas Trucking validly avoided paying the Mississippi road and bridge privilege tax, then it also had no *ad valorem* tax obligation.

¶40. To address whether this was a permissible reading of the statutes, Thomas Trucking sought to introduce evidence of prior attorney general and tax commission views on this issue. The chancellor did not err in refusing to admit into evidence a withdrawn 1970 attorney general opinion, but the opinion contained a legal argument that the chancellor should have been willing to consider. Moreover, Thomas Trucking could, and did, make the same legal arguments to the chancellor as were contained in the withdrawn opinion letter.

¶41. The testimony of Frank McCain, State Tax Commission Revenue Director, would have discussed the history

of taxation in this area. The State Tax Commission is the agency empowered to interpret and apply the relevant law. Miss. Code Ann. § 27-19-1 (1995). ("The State Tax Commission . . . is hereby vested with the sole power . . . of administering and enforcing the terms" of the Motor Vehicle Privilege Tax Act.) I find it to be error for the chancellor to have declined to receive an explanation as to how the Commission had interpreted the taxing scheme.

¶42. When the relevant statutes say nothing explicit about the key issue in the litigation, namely, who has to pay the tax in question, then it is my view that the chancellor should have been looking for additional evidence from any relevant source. The proffer that was made through McCain discussed the interpretation of these statutes regarding "the appropriate jurisdiction into which a trucking company would be required to purchase its base plate" or tag. As part of that testimony, McCain mentioned the reciprocal agreements that could be entered between Mississippi and other States pursuant to the "International Registration Plan." *See* Miss. Code Ann. § 27-19-143 (1995) (reciprocity agreements.)

¶43. McCain testified that Mississippi entered into this plan on November 1, 1975. Under the IRP, a trucking company could buy a tag in a State in which it had a telephone, some truck mileage, accessible records, and a person conducting the business. By 1987, McCain and others at the tax commission became aware that trucking companies were using the IRP to permit selecting the most advantageous State in which to purchase a tag. Alabama won out over Mississippi in Thomas Trucking's

situation. The bridge and license fee it paid there was apportioned between States based on mileage.

¶44. Beginning in 1987, McCain and the commission sought corrective legislation to apportion *ad valorem* taxes among States based on mileage traveled within each State. What was needed and what was finally acquired was a statutory scheme that replaced an unapportioned *ad valorem* tax based on where a vehicle was tagged, to an apportioned scheme based on miles traveled. Miss. Code Ann. § 27-19-11, 27-19-143 & 27-51-41 (1995). McCain testified that a large number of trucking companies did what Thomas Trucking did, and a statutory change was pursued by the tax commission to correct the resulting taxation shortfall to Mississippi.

¶45. It is my view that the previous version of the applicable statutes permitted a business such as Thomas Trucking to choose the State in which to be licensed. Since it is the payment of the road and bridge privilege tax that creates the *ad valorem* tax obligations, proper payment in Alabama under the previous version of the statutes meant that there was no *ad valorem* tax to pay in Mississippi.

¶46. In summary, none of the statutes then in existence explicitly required that all vehicles domiciled in Mississippi be tagged in Mississippi. The statutes did require that a vehicle tagged in Mississippi pay an unapportioned *ad valorem* tax. The reasonable interpretation of these two facts is that there was no requirement that a vehicle licensed in another State also be licensed here. Such an obligation, by also creating an unapportioned *ad valorem* obligation, would have been unconstitutional. I

find in the silence of the Legislature on this point no intent that is being overridden. I would reverse and render, and I must respectfully dissent.

BANKS, SMITH AND MILLS, JJ., JOIN THIS OPINION.

IN THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

J. E. "BILL" MITCHELL, LEE COUNTY, MISSISSIPPI TAX COLLECTOR — PLAINTIFF

CAUSE NO. 42,286

VS.

THOMAS TRUCK LEASE and GIBSON CONTAINER, INC. — DEFENDANTS

OPINION

This suit was initiated by J. E. "Bill" Mitchell, Tax Collector of Lee County, Mississippi against Thomas Truck Lease, (hereinafter "Thomas"), an Alabama Corporation, that has its principal place of business in Columbus, Lowndes County, Mississippi.

"Thomas" owns a large number of commercial trucks that it rents, without drivers, to other companies.

During the relevant years, "Thomas" entered into a lease agreement with Gibson Container, Inc., (hereinafter "Gibson"), an Arkansas corporation, which carries on a business in Lee County, Mississippi. Likewise, "Thomas", at all relevant times, owned land and a building in Lee County, Mississippi, where it maintained, fueled, repaired and stored or garaged all the trucks it leased to "Gibson".

Generally, all of "Gibson's" trucks were within the "Thomas' " compound at the end of each day. During the course of each business day, a number of the "Gibson" trucks traveled the highways in interstate commerce.

Although "Thomas" has an office and facility in Alabama, and "Gibson" has an office in Arkansas, none of the vehicles in question, were ever stored, fueled or maintained at either of such facilities.

The lease agreement between "Thomas" and "Gibson" provides that "Thomas" would indemnify and hold harmless, "Gibson", from any loss as to the tax question involved in this suit, hence the thrust of this litigation.

The plaintiff contends that ad valorem tax is due to it by the defendants, for the tax years 1988-1989, 1989-1990 and 1990-1991, on the tractor trucks in question, plus all applicable penalties and interest provided by law.

The defendant's contend that under Article I, Section VIII of the Constitution of the United States and the "International Registration Plan", no ad valorem taxes are due, or if they are due, they should be apportioned in accordance with a number of decisions of the United States Supreme Court.

The State of Mississippi has a multi-tiered scheme of taxation, a part of which requires that ad valorem taxes on personal property is collected at the same time that someone purchases a license plate or tag.

As to tractor-truck units, such as those in question, the owner is required to pay ad valorem taxes to a county before he obtains a license plate, which is issued by the State Tax Commission. (This was the manner of taxation prior to a statutory change made in 1993).

Although not directly applicable in the instant case, when a taxpayer or person domiciled in a county, such as Lee County, Mississippi, renders up to a tax collector, his,

her or its property for taxation on a motor vehicle, which is done when a license plate or tag is purchased, a number of taxes or fees are collectible. i.e., use tax, privilege tax, registration fee and ad valorem taxes are collected. In the instant case, Lee County, Mississippi is not attempting to collect a registration fee, use tax, a privilege tax or tag fee. It desires to collect an ad valorem tax upon taxable property located within domiciled, stored, garaged, fueled, maintained and dispatched from Lee County, Mississippi.

For the purpose of the present litigation, the defendant, "Gibson", is the statutory "owner" of the tractor-trucks that it leases from the plaintiff, "Thomas". At all relevant times, the tractor-trucks, and any replacements, were taxable in Lee County, Mississippi for ad valorem tax purposes.

Article I, Section VIII of the United States Constitution commonly called the "Commerce Clause", prohibits the several states of the union from imposing a tax that places a much heavier burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents, who also engage in interstate commerce. This Court is of the opinion that the ad valorem tax sought to be imposed by Lee County, Mississippi, does not violate the "Commerce Clause" of the United States Constitution.

Under the facts in this case, the cases of *Ott v. Mississippi Valley Barge Line*, 336 U.S 169; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S 382, 60 L.Ed 396, 99 S.Ct. 1813 (1979); and *Standard Oil Company v. Peck*, 342 U.S. 382, 96 L.Ed 427, 72 S.Ct. 309, do not lead this Court to

the conclusion that the tax sought to be applied by Lee County, Mississippi, is unconstitutional.

Unlike, *Japan Line, Ltd. v. County of Los Angeles*, at best the tractor-trucks are only involved in interstate commerce, not foreign commerce. This Court need not delve into a more extreme constitutional inquiry. *Japan Line, Ltd. vs. County of Los Angeles*, supra at 444; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) and subsequent cases are more in line with what inquiry this Court must make.

Of significance, is the case of *American Trucking Associations, Inc. v. Scheiner*, 483 U.S 266, 107 S.Ct 2829 (1987). This case struck down two flat rate or flat taxes that were imposed by the State of Pennsylvania. The Supreme Court held that the taxes discriminated against interstate commerce in granting a competitive advantage to local businesses. Cited in *America Trucking Association, Inc. v. Scheiner*, supra, is the general four (4) prong test used to determine whether or not a state tax on interstate commerce offends the Commerce Clause. The Commerce Clause is not offended if the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, supra at 279.

The State of Mississippi has a multi-tiered revenue gathering system. Among other taxes, the state imposes and collects road and bridge taxes, registration fees, privilege taxes and ad valorem taxes on motor vehicles. For ease of collection, ad valorem taxes on motor vehicles are

paid annually at the same time that a license or tag is purchased. The law in Mississippi, for a number of years, has required a resident operating a tractor-trailer truck to pay ad valorem taxes in the county where the "owner" was located, and then obtain his license or tag from the State Tax Commission on an apportioned basis if used in interstate commerce. Out-of-state or "foreign registered" vehicles only pay their apportioned share of road, bridge, use and privilege taxes.

The facts of this case show that the statutory "owner" of the tractor-truck units is the defendant, "Gibson". The units are kept, dispatched, stored maintained, etc., in Lee County, Mississippi. Each day the units are in Lee County, Mississippi and the bulk of the time when not on the highway, are located in a compound in Lee County, Mississippi. The State of Mississippi and Lee County, Mississippi furnish daily substantial opportunities, benefits and protection to the tractor-truck units in question. Under Mississippi law, the units are not being taxed at 100% of their respective values. The statutory law of Mississippi, as applied by the plaintiff against the defendants, does not extract a tax that violates Article I, Section VIII, of the United States Constitution. It extracts revenue from the defendants, as it does from all resident domiciled entities that keep and use property subject to ad valorem taxation in Lee County, Mississippi.

The Defendants contend that the ad valorem tax scheme used by the Plaintiff, has been held unconstitutional under the cases of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) and *Standard Oil Company v. Peck*, 343 U.S. 382, 72 S.Ct. 309, 96 S.Ct. 309. As noted earlier, *Japan Line, Ltd. v.*

County of Los Angeles, deals primarily with international commerce. *Standard Oil Company v. Peck*, deals with a factual situation where the property sought to be taxed, had very minimal contact with the taxing state.

However, as each of the last two cases noted, the Supreme Court, in its case law, seeks to prevent multiple taxation of an interest instrumentality from being subjected to more than one tax on it's *full value*. In the matter before this Trial Court, the State of Mississippi is not taxing the full value of the tractor-truck units used in interstate commerce. (Fees for road use, etc., are in fact apportioned.) Mississippi is not taxing the Defendants more heavily when their business interests cross state lines than when it occurs entirely within the state. *Armco v. Hardesty*, 467 U.S 638, 104 S.Ct 2620, 81 L.Ed.2d 540 (1984) at 642. As the Supreme Court said in *American Trucking Association, Inc. v. Scheiner*, supra, at 282, " . . . the Commerce Clause prohibits a state from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among the states . . . " The method of assessing the Mississippi ad valorem taxes, is on Mississippi based vehicles. Any of the tractor-truck units in question, that roam the highways of this Nation, only pay Mississippi an apportioned "road use" type tax. The fact that Mississippi based carriers were at a competitive disadvantage, was recognized by the Mississippi Legislature, and the laws were changed so that Mississippi based carriers are no longer in a competitive disadvantage, tax wise. Until M.C.A. §27-19-11 was amended, the impact of the ad valorem tax was assessed against Mississippi based tractor-truck

units, whether they crossed a state line or not. If they had, then they paid apportioned road, bridge and privilege taxes.

It is contended by the Defendants, that an interstate compact type law known as the International Registration Plan, applies in this case. The Plaintiff even alludes to the fact that Mississippi belongs to the International Registration Plan.

This Court notes that there does exist an agreement called the International Registration Plan, and that document shows that Mississippi became a member in late 1974 or early 1975. Even assuming that Mississippi is validly bound to, or legally a part of the International Registration Plan, the Defendants, none the less, wrongfully registered the tractor-truck units in the state of Alabama. All facts show that the trucks are domiciled in Lee County, Mississippi. Further, this Court is of the opinion that the International Registration Plan does not restrict or apply to the ad valorem taxes in question.

Of great concern to this Court, is whether there was any proof of what "compact" Mississippi legally belongs. M.C.A. §27-19-143 authorizes the Motor Vehicle Comptroller (now Chairman of the State Tax Commission), the Attorney General and Governor to enter into reciprocating agreements and compacts with other states concerning the operation of motor vehicles properly registered in other states. The Defendants, nor anyone else, has produced any document showing that the International Registration Plan is the agreement or compact authorized by §27-19-143. Likewise, there have been amendments to the International Registration Plan, but there is no legal proof

as to whether Mississippi adopted or rejected any amendments, nor is there any legal proof, as would be required under §27-19-143, to show what compact or reciprocated agreement was in effect under the thirty (30) day revocation period of that act. This Court questions whether the Legislature can delegate its duty and responsibility under §27-19-143 to the executive branch.

This Court is of the opinion that the defendants are jointly and severally indebted to Lee County, Mississippi in the sum of $246,078.78, for back taxes due on the units in question, for which execution may lay. There is no immunity in favor of those Defendants from paying taxes due.

This Court reserves the right to make further findings of fact and conclusions of law in this trial.

This the 10th day of April, 1995.

/s/ Timothy E. Ervin
TIMOTHY E. ERVIN
CHANCELLOR

IN THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

J. E. "BILL" MITCHELL, LEE COUNTY, MISSISSIPPI TAX COLLECTOR — PLAINTIFF

VS. — CAUSE NO. 42,286

THOMAS TRUCK LEASE and GIBSON CONTAINER, INC. — DEFENDANTS

ADDENDUM TO OPINION

Page two (2), lines eight (8) and nine (9) are amended to include the tax year 1991-1992, which was inadvertently left off in the original Opinion.

This the 17th day of April, 1995.

/s/ Timothy E. Ervin
TIMOTHY E. ERVIN
CHANCELLOR

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 95-CA-00745 COA

THOMAS TRUCK LEASE, INC.
AND GIBSON CONTAINER, INC. APPELLANTS

v.

LEE COUNTY, MISSISSIPPI, BY AND
THROUGH ITS FORMER TAX COLLECTOR,
J.E. (BILL) MITCHELL AND HIS
SUCCESSOR IN OFFICE,
CHARLES DILLARD APPELLEE

THIS OPINION IS NOT DESIGNATED FOR
PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:
04/20/95

TRIAL JUDGE:
HON. TIMOTHY E. ERVIN

COURT FROM WHICH APPEALED:
LEE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:
ROBERT L. WELLS

ATTORNEYS FOR APPELLEE:
STEPHEN MONROE CORBAN
WILLIAM M. BEASELY

NATURE OF THE CASE:
CIVIL - OTHER

TRIAL COURT DISPOSITION:
FOUND APPELLANTS OWED $246,078.78

IN BACK TAXES FOR PRE-1993 AD VALOREM

DISPOSITION:
AFFIRMED - 10/27/1998

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED:

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.
KING, J., FOR THE COURT:

This action was filed in the Chancery Court of Lee County, Mississippi by J.E. (Bill) Mitchell, (Mitchell) in his capacity as Lee County Tax Collector, against Thomas Truck Lease, Inc., (Thomas) and Gibson Container, Inc., (Gibson) seeking to collect ad valorem taxes, for the years 1988-89, 1989-90 and 1990-91, on tractor truck units owned by Thomas and leased to Gibson.

The court entered judgment for the taxes and applicable penalties. It is from this judgment that Thomas and Gibson have appealed.

Thomas and Gibson have alleged the following errors:

I. The trial Court erred by not allowing into evidence the following:

A. An October 5, 1981 Attorney General's Opinion stating that Mississippi may not constitutionally collect an unapportioned ad valorem tax on trucks that travel in interstate commerce.

B. The testimony of Director of the Revenue Bureau of the State Tax Commission,

Mr. Frank McCain, explaining the history, problems, and efforts of the Tax Commission to adopt an apportioned ad valorem tax, an effort that finally succeeded in 1993.

II. The Trial Court erred by not adopting a consistent decade old practice and interpretation of Mississippi's tax laws (used by all Mississippi tax Collectors and the State tax Commission) when an inconsistent interpretation would now cause hardship, confusion, unfairness and mischief. The interpretation being until 1993, trucks traveling in interstate commerce over the highways of Mississippi did not owe ad valorem taxes of the tags for those vehicles were legally purchased in another state.

III. The Trial Court erred by not enforcing court ordered responses to requests for admission, and it should have found that the trucks in this case were exempt from ad valorem taxes because the tags for the trucks were legally purchased in another state.

IV. The Trial Court should have given Thomas Truck the benefit of the tax amnesty passed by the Legislature after Thomas Truck complied with the amnesty requirements- it re-tagged its trucks in Mississippi before July 1, 1993.

V. The Trial Court erred in imposing a non-apportioned ad valorem tax on an instrumentality of interstate commerce in violation of the Commerce Clause of the United States Constitution.

VI. The Trial Court erred in imposing more taxes on Thomas Truck than the parties stipulated were owed.

VII. The Trial Court erred in not issuing an injunction forcing the tax Collector of Lee County to collect taxes from other trucking companies similarly situated to Thomas Truck.

This Court affirms the judgment of the Chancery Court of Lee County.

Facts

Gibson Container, Inc., is a manufacturer and distributor of cardboard boxes. During the period relevant to this action, all of its administrative and production facilities were located in Lee County, Mississippi.

Thomas Truck Lease, Inc., is an Alabama corporation, engaged in the business of leasing tractor trucks. Its principal place of business is maintained in Columbus, Lowndes County, Mississippi.

On March 14, 1988, Thomas entered into a contract with Gibson and, pursuant to that contract, Thomas was to lease to Gibson several vehicles (tractor trucks) to use in the distribution of its product. These vehicles were to be used only in the states of Mississippi, Alabama, Arkansas, Louisiana and Tennessee.

Under paragraph 5A of the contract, Thomas specifically agreed "to provide or pay for the state motor vehicle license for the licensed weight shown on schedule A and personal property taxes for each vehicle in the state of domicile. . . . "

The agreed domicile for these leased vehicles, as set out on schedule A, was Tupelo, Mississippi.

J.E. "Bill" Mitchell, as Tax Collector of Lee County, Mississippi, wrote to Thomas Truck Lease, Inc., requesting payment of ad valorem taxes on vehicles leased by it to Gibson Container, Inc., and domiciled in Lee County, Mississippi. Taxes, penalties and interest were assessed against Thomas for the years 1990-91 ($39,213.75), 1989-90 ($46,754.97), and 1988-89 ($49,012.03).

Thomas failed to pay the requested taxes and Mitchell filed suit in the Chancery Court of Lee County, Mississippi, seeking to collect the ad valorem taxes and all applicable penalties and interest for the years 1988-89, 1989-90 and 1990-91.

Thomas filed an answer which (1) denied that the subject vehicles were domiciled in Lee County, Mississippi, (2) alleged that Mississippi "was a member of the International Registration Plan, an Interstate Treaty . . . and all ad valorem taxes owed . . . were paid and remitted pursuant to the terms of the International Registration Plan", and (3) that ad valorem taxes had been paid in Alabama where defendant was domiciled.

Thomas subsequently filed an amended answer, which (1) alleged this tax was unapportioned, placed an undue burden on interstate commerce, and therefore was in violation of the United States Constitution and (2) claimed a tax amnesty pursuant to § 27-19-11 of the Mississippi Code of 1972, as amended.

The trial court disagreed, and entered judgment against Thomas Trucking for taxes, penalties and interest.

Analysis

I.

A. THE TRIAL COURT ERRED BY NOT ALLOWING INTO EVIDENCE AN OCTOBER 5, 1981 ATTORNEY GENERAL'S OPINION STATING THAT MISSISSIPPI MAY NOT CONSTITUTIONALLY COLLECT AN UNAPPORTIONED AD VALOREM TAX ON TRUCKS THAT TRAVEL IN INTERSTATE COMMERCE.

The State Legislature, by Miss. Code Ann. § 7-5-1 (Rev. 1991), has designated the Attorney General as "the chief legal officer and advisor for the state." Consistent with this role the Legislature in § 7-5-25, of the Mississippi Code, had enumerated a limited group of public officials and agencies entitled to receive and rely upon the written opinions and advice of the Attorney General.

Opinions of the Attorney General are not usually intended for use by the general public or in a court proceeding. Opinions of the Attorney General may be offered in court proceedings for a very limited purpose. That purpose is to demonstrate the good faith of a public official who has acted in conformity with the opinion of the Attorney General and immunize that public official for actions undertaken in good faith. Conversely, when a public official has acted contrary to an opinion of the Attorney General, that opinion may be introduced to demonstrate a lack of good faith by the official in his actions. *See* Miss. Code Ann. § 7-5-25 (Rev. 1991). Any opinion introduced for this purpose, is not an enunciation of the law which is binding upon the courts of this State. The enunciation of the law is the province of the court. *Griffin v. Fletcher,* 362 So. 2d 594, 595 (Miss. 1978).

The opinion which Thomas Trucking wished to offer in evidence was withdrawn by the Attorney General, several years prior to the attempt to collect ad valorem taxes from Thomas Trucking. The withdrawal of an opinion by the Attorney General renders that opinion a nullity. When an opinion is withdrawn, its sole limited purpose is to judge the good faith of a public official or agency for an action taken in reliance on that opinion while it was effective.

Because the opinion of October 5, 1981, was a nullity when these actions were undertaken by the tax collector, it therefore had no relevance to this issue.

The Chancellor so found and properly excluded this opinion under Rules 401 and 402 of the M.R.E.

B. THE TRIAL COURT ERRED BY NOT ALLOWING INTO EVIDENCE THE TESTIMONY OF THE DIRECTOR OF THE REVENUE BUREAU OF THE STATE TAX COMMISSION, FRANK MCCAIN EXPLAINING THE HISTORY, PROBLEM AND EFFORTS OF THE TAX COMMISSION TO ADOPT AN APPORTIONED AD VALOREM TAX, AN EFFORT THAT FINALLY SUCCEEDED IN 1993.

Courts long ago recognized the value of looking at the history behind a statute to resolve ambiguities as to its intent. *Boring v. State*, 365 So. 2d 960, 962 (Miss. 1979). Relevant to, and a part of, that history are subsequent statutory enactments which specifically alter or substantially impact the statute under consideration. However, subsequent statutory enactments are generally not applied retrospectively and do not impact actions commenced under the former statute prior to the effective

date of the new statute. *Miss. Ins. Guar. Ass'n v. Gandy,* 289 So. 2d 677, 680 (Miss. 1974).

The taxes which Lee County sought to collect were for the period 1988-89, 1989-90 and 1990-91. This action was filed on February 20, 1991. The change in the collection of ad valorem taxes was effective July 1, 1993. The obligation to pay these taxes vested prior to July 1, 1993. Vested obligations, for which enforcement has been undertaken, are not impacted by subsequent enactment. *State v. Ladner,* 512 So. 2d 1271, 1275 (Miss. 1987).

The subsequent efforts, reasons for and results of the Tax Commission's efforts to change the collection of ad valorem taxes on trucks were not relevant to the issue of ad valorem taxes owed by Thomas Trucking prior to 1993. The chancellor so held and properly excluded this evidence under Rules 401 and 402 of the M.R.E.

II. THE TRIAL COURT ERRED BY NOT ADOPTING A CONSISTENT DECADE OLD PRACTICE AND INTERPRETATION OF MISSISSIPPI'S TAX LAWS (USED BY ALL MISSISSIPPI TAX COLLECTORS AND THE STATE TAX COMMISSION) WHEN AN INCONSISTENT INTERPRETATION WOULD NOW CAUSE HARDSHIP, CONFUSION, UNFAIRNESS AND MISCHIEF. THE INTERPRETATION BEING-UNTIL 1993, TRUCKS TRAVELING IN INTERSTATE COMMERCE OVER THE HIGHWAYS OF MISSISSIPPI DID NOT OWE AD VALOREM TAXES IF THE TAGS FOR THOSE VEHICLES WERE LEGALLY PURCHASED IN ANOTHER STATE.

Pursuant to Miss. Code Ann. § 27-51-7 an ad valorem tax is required to be paid by all persons required to pay

road and bridge privilege license taxes. Thomas Trucking requested that the trial court, and now this Court, interpret this statute consistent with what is called the "International Registration Plan." Under the interpretation suggested by Thomas Trucking, it would have owed no ad valorem taxes or substantially less than Lee County assessed.

The trial court found, and this Court agrees, that such an interpretation is unwarranted. Only when there is an ambiguity in a statute should the court engage in judicial construction. *Stone v. Green,* 199 Miss. 6, 9, 23 So.2d 542 (Miss. 1945). There is no ambiguity in this case. Pursuant to Miss. Code Ann. 27-19-57, the privilege tax for a motor vehicle, shall be paid " . . . in the county in which such vehicles are domiciled or the county from which such vehicles most frequently leave and return. However, while not ambiguous, it must be read in conjunction with other sections of the Code, specifically § 27-19-11, (2), which imposes a privilege license on private commercial carriers and § 27-19-3 which establishes the domicile or ad valorem tax situs of leased vehicles.

Pursuant to Miss. Code Ann. § 27-19-3, the domicile of a leased vehicle is at the residence of a resident lessee or the principal place of business of a nonresident lessee. Gibson was a resident lessee. Gibson maintained its principal place of business in Lee County, and the vehicles were dispatched from and returned to Lee County every day. The trial court held and this court agrees, that Lee County was the domicile of these vehicles.

When reviewing the decision of a chancellor, this court must defer to his findings, if they are supported by

substantial evidence, and will reverse only if his findings are not supported by substantial evidence, or where he has committed manifest error. *Croenne v. Irby,* 492 So. 2d 1291, 1294 (Miss. 1986).

The evidence reflected that for the taxing periods in question, Gibson Containers (1) had no offices outside of Lee County, (2) had no manufacturing plants outside of Lee County, and (3) had no facilities in the State of Alabama.

The contract between Gibson and Thomas Trucking specifically identified Lee County as the domicile of the trucks.

We hold that the chancellor's actions were supported by substantial evidence and were not manifestly in error.

The author of one of the dissents has suggested reversal based upon his belief that Thomas had properly tagged its vehicles in Alabama, and therefore owed no taxes to Lee County or Mississippi.

As a foundation for that position, the author holds that pursuant to the International Registration Plan, Thomas could have chosen to tag its vehicles in Alabama.

The trial court rejected this argument, saying (1) there was no evidence that Mississippi had done those things to lawfully and properly join the International Registration Plan, and (2) assuming *arguendo,* that it joined the International Registration Plan, there was no evidence of which of several plans was the actual plan.

It is hornbook law that one seeking the benefit of a contract must prove the actual contract and due execution. *See generally, Bradley v. Howell,* 161 Miss. 346, 351,

133 So. 660, 661 (Miss. 1931) (The proponent of a contract has the burden of proof.) The international Registration Plan, is at its simplest, a contract among states, and must be so established.

Thomas did not prove the contract or its due execution, accordingly, this argument fails. So, too, does the dissent fail.

III. THE TRIAL COURT ERRED BY NOT ENFORCING COURT ORDERED RESPONSES TO REQUESTS FOR ADMISSIONS AND IT SHOULD HAVE FOUND THAT THE TRUCKS IN THIS CASE WERE EXEMPT FROM AD VALOREM TAXES BECAUSE THE TAGS FOR THE TRUCKS WERE LEGALLY PURCHASED IN ANOTHER STATE.

Thomas Trucking, by this assignment of error, suggests that this cause should have been resolved in its favor on the strength of appelle's [sic] responses to requests for admissions. Generally the requested admissions related to the International Registration Plan (IRP) and the registration of vehicles under this plan.

Pursuant to Rule 36(a), MRCP, a party may request the admission of matters of fact and the application of law to these facts.

Review of the referenced requests indicates that appellee acknowledged the IRP as a general proposition, but did not acknowledge its applicability to this matter. Indeed, appellee has consistently argued that the IRP did not apply to the facts of this case.

In rejecting the argument of Thomas Trucking, the trial court observed that the issue presented to the court was one of law, and could not be admitted. This court agrees. The law is not what is stated by the parties, but rather that which is stated by the court. *Presley v. Miss. Highway Comm'n*, 608 So. 2d 288, 1294 (Miss. 1992). We therefore find no error in the ruling of the trial court.

The appropriateness of this ruling was further demonstrated by the trial court's ruling that no real proof had been addressed to establish that Mississippi was a participant in the International Registration Plan, or if a participant, what was the applicable plan. Without proper proof of Mississippi's participation in the IRP, and an identification of the applicable plan, the definitions contained therein are irrelevant.

IV. THE TRIAL COURT SHOULD HAVE GIVEN THOMAS TRUCK THE BENEFIT OF THE TAX AMNESTY PASSED BY THE LEGISLATURE AFTER THOMAS TRUCK COMPLIED WITH THE AMNESTY REQUIREMENTS-IT RE-TAGGED ITS TRUCKS IN MISSISSIPPI BEFORE JULY 1, 1993.

The 1993 session of the Mississippi Legislature amended Miss. Code Ann. § 27-19-11, effective July 1, 1993, to include the collection of ad valorem taxes with privilege tax. It also provided that where a vehicle registered out of state was brought into Mississippi before July 1, 1993, it would not be subject to taxes for the period prior to July 1, 1993.[1]

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[1] § 27-19-11 in pertinent part reads, "Provided, however until July 1, 1993, vehicles which are subject to the provisions of

When one reads this in isolation, it might well appear to be a general tax amnesty. However, statutes must be read and harmonized in whole rather than in part. *Roberts v. Miss. Republican Party State Executive Comm.*, 465 So. 2d 1050, 1052 (Miss. 1985).

Included as a part of the bill passed by the Legislature in 1993 changing the collection of ad valorem taxes is what is identified as chapter 496, Laws of 1993. That chapter provides:

> Nothing in this act shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due or approved under the tax laws amended by this act prior to the date on which this act becomes effective, whether such assessments, appeals, suits, claims or actions shall have been begun before the date on which this act becomes effective or shall thereafter be begun; and the provisions of such tax laws as amended by this act are expressly continued in full force, effect and operation for the purpose of the assessment, collection and enrollment of liens for any taxes due or accrued and execution of any warrant under such laws prior to the date on which this act becomes effective, and for the imposition of any penalties, forfeitures or claims for failure to comply therewith.

When read in harmony, it becomes clear that the Legislature did not, nor intend to, impact taxes which had accrued on July 1, 1993, the effective date of this act.

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this section and were licensed in another state shall not be subject to any other taxes when registered in this state.

The taxes, which are the subject of this action, had accrued and active efforts were undertaken to collect them prior to July 1, 1993. Those active efforts to collect these accrued taxes included the filing of a complaint against Thomas Trucking on February 20, 1991. That complaint began the action which is currently under review by this court.

When harmonized these statutes do not support Thomas Trucking's contention of a general tax amnesty.

Where an individual claims exemption (or amnesty) from the general application of a tax law, he bears the obligation to prove the existence of the exemption (or amnesty) and that it applies to him. *N.W. Indus., Inc. v. McKeigney,* 230 Miss. 566, 573, 93 So. 2d 481, 483 (Miss. 1957).

Thomas Trucking has failed to prove the amnesty and its application to its operations.

V. THE TRIAL COURT ERRED IN IMPOSING A NON-APPORTIONED AD VALOREM TAX ON AN INSTRUMENTALITY OF INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Thomas Trucking asks this Court to determine that the ad valorem taxes sought were not apportioned and therefore in violation of the Commerce Clause of the United States Constitution.[2]

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[2] The Commerce Clause, Article I, Section VIII, provides, "The Congress shall have power . . . (3) to regulate commerce

All parties agree that a properly apportioned tax would not do violence to the Commerce Clause. *See W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256, 585 S. Ct. 546, 549 (1938)[3].

Thomas Trucking relies heavily on *Japan Lines, Ltd. v. L.A.*, 441 U.S. 434 (1979), to support its position. This reliance appears to be misplaced.

Japan Lines involved a question of international trade, as opposed to interstate trade. Because this was a matter of international trade, there existed no body with the authority to ensure apportionment. *Id.* at 445. It was this susceptibility to multiply [sic] taxation which lead the Supreme Court to invalidate the tax in *Japan Lines*, "[d]ue to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though fairly apportioned to reflect an instrumentality's presence within the State may subject foreign commerce to the risk of a double tax burden to which domestic commerce is

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with foreign nations, and among the several States, and with the Indian Tribes."

[3] In *Western Livestock*, the court held: It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, and the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained.

not exposed, and which the commerce clause forbids." *Id.* at 448.

The tax in this case is not subject to that infirmity. "The basis for this court's approval of apportioned property taxation . . . has been its ability to enforce full apportionment by all potential taxing bodies." *Id.* at 447.

Having determined that such a tax does not automatically offend the Commerce Clause, we next consider what finding is necessary to allow such a tax. Instruction on this issue can be found in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S. Ct. 1076 (1977) where the court observed "[we] . . . have sustained a tax against Commerce Clause challenge when the tax is applied to or actively with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." *Id.* at 279.

Gibson Container (1) maintains its offices in Lee County, (2) manufactures its products in Lee County, and (3) ships its products by trucks which leave from and return each day to its Lee County plant, clearly there is a nexus between Lee County and Gibson Container. Gibson Containers (1) uses fire and police protection provided by Lee County, and (2) its employees' children attend public schools and libraries provided by Lee County. All of these benefits are funded in large measure by the ad valorem tax.

Lastly Lee County has not taxed the full value of appellant's property. Miss. Code Ann. § 27-35-4(3), mandates that the taxes be applied to only 30% of the true value of appellant's property.

This is the same rate applied to intrastate motor vehicles. The trial court found, and we agree, that Lee County's tax rate was fairly apportioned, and did not discriminate against interstate commerce.

VI. THE TRIAL COURT ERRED IN IMPOSING MORE TAXES ON THOMAS TRUCKS THAN THE PARTIES STIPULATED WERE OWED.

We find no merit in this alleged error.

The parties stipulated as to taxes and the statutory penalty. This stipulation did not, and could not, cover the interest mandated by § 27-41-9[4]; this interest accrues until the taxes are paid and can only be finally determined at that time.

VII. THE TRIAL COURT ERRED IN NOT ISSUING AN INJUNCTION FORCING THE TAX COLLECTOR OF LEE COUNTY TO COLLECT TAXES FROM OTHER TRUCKING COMPANIES SIMILARLY SITUATED TO THOMAS TRUCK.

The trial court denied Thomas Trucking's request for an injunction against the appellee, Mitchell, to require that he perform his job as tax collector.

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[4] Miss. Code Ann. § 27-41-9 in pertinent part reads:

If any taxpayer neglects or refuses to pay his taxes on the due date thereof, the said taxes shall bear interest at the rate of one percent (1%) per month or fractional part thereof from the delinquent date to the date payment of such taxes is made.

This request was denied by the chancellor without specific findings. However, our review of the record suggests that Thomas failed to meet its burden of proof. While Thomas raised questions regarding whether other trucking companies should be required to pay ad valorem taxes, it never established that Mitchell either failed or refused to perform his duty.

To obtain an injunction under these circumstances, Thomas would have to establish (1) that Mitchell either negligently failed or refused to perform his duties, and (2) that no other remedy was available. *See* MRCP 65.

Thomas failed on both accounts.

THE JUDGMENT OF THE LEE COUNTY CHANCERY COURT AGAINST THE APPELLANTS FOR AD VALOREM TAXES OF $246,078.78 PLUS INTEREST (MISS. CODE ANN. § 27-41-9) IS AFFIRMED. APPELLANTS ARE ASSESSED ALL COSTS OF THIS APPEAL, INTEREST AT THE LEGAL RATE, AND THE STATUTORY PENALTY OF FIFTEEN PERCENT.

BRIDGES, C.J., COLEMAN, DIAZ AND PAYNE, JJ., JOIN THIS OPINION. SOUTHWICK, J., DISSENTS WITH SEPARATE OPINION JOINED BY MCMILLIN, P.J., AND HERRING, J. HINKEBEIN, J., DISSENTS WITH SEPARATE OPINION JOINED BY THOMAS, P.J.

HINKEBEIN, J., DISSENTING:

Because I agree with Gibson Container's contention regarding the unconstitutionality of Mississippi's former statutory scheme, I respectfully dissent. I will confine my comments to this particular issue as I feel it is dispositive of the case at hand.

Despite the express grant to congress of the power to "regulate Commerce . . . among the several States," U.S. Const., art. I, § 8, cl. 3, the United States Supreme Court has repeatedly held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when congress has failed to legislate on the subject. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1994). This construction serves the clause's purpose of preventing a state from retreating into economic isolation or jeopardizing the welfare of the country as a whole, as it would if it were free to place burdens on the flow of commerce across its borders that wholly intrastate transactions would not bear. *Jefferson*, 514 U.S. at 180. This certainly does not mean that interstate commerce is exempt for paying its share of the state tax burden. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1930). The supreme court has regularly sustained property taxes levied against various forms of transportation equipment. *Japan Line, Ltd. v. City of Los Angeles*, 441 U.S. 434, 444 (1979). However, as the majority notes, modern Commerce Clause threats of this kind must survive the four-prong test enumerated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), wherein the court held that any tax statute must be (1) applied to an activity with a substantial nexus with the taxing state, (2) fairly apportioned, (3) non-discriminatory toward interstate commerce, and (4) fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. It is not the formal language of the tax statute, but rather its practical effect which is to guide this evaluation. *Id.* As such, validity "is not to be determined by artificial standards."

Assoc. Industries of Missouri v. Lohman, 511 U.S. 641, 655 (1994) (*quoting Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)). What is required is that state action, "whether through one agency or another, or through one enactment or more than one," be consistent with the restrictions of the constitution. *Lohman*, 511 U.S. at 655.

Since, as the majority indicates, these vehicles returned to Mississippi each evening during the relevant period, one cannot seriously doubt that the required nexus exists. Mississippi had a right to levy some tax on these vehicles since they certainly maintained sufficient contact so as to establish a second taxable situs aside from Gibson Container's Arkansas domicile. *See Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 600-2 (1954) (holding that airline's regularly scheduled landings established non-domiciliary jurisdiction's power to levy an *apportioned* ad valorem tax). Moreover, as an ad valorem tax of general application, the tax at issue is applied across the board, without considering whether a particular vehicle may or may not be traveling in interstate commerce. As such, it seems to have been designed as a nondiscriminatory method of collecting funds for fire and police protection. However, the pertinent issue in this case is whether Mississippi's former tax scheme was properly apportioned within the meaning of the second prong of the *Complete Auto* test, the purpose of which is to "ensure that each state taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). The goal is to avoid the potential for multiple taxation, which is threatened whenever one state's act of overreaching combines with the possibility that another will also claim its legitimate share

of the value taxed. *Jefferson*, 514 U.S. at 185. *See also, Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980) (confirming that, it is the mere "risk" of multiple taxation with which the inquiry we are to be concerned). Therefore, the states may collectively reach all of an interstate business' profits and so forth; however, they must share the resulting revenues. *See, e.g., Complete Auto*, 430 U.S. at 281. The corollary of this, of course, is that no one state may tax the instrumentality in full. *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-5 (1952). Any danger of this is evaluated by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. *Jefferson*, 514 U.S. at 185 (*citing Goldberg*, 488 U.S. at 261).

Internal consistency looks to the structure of the tax at issue, and is lost when the hypothetical application of an identical tariff by every other state in the union would place interstate commerce at a disadvantage as compared with commerce intrastate. *Id.* Such a failure shows, as a matter of law, that the tax is invalid since allowing such a tax in one state would necessarily place interstate commerce at the mercy of the remaining states. *Id.* (citing *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). In contrast, external consistency addresses a broader comparison of the state's tax with that portion of value that is fairly attributable to economic activity within its own borders. *Jefferson*, 514 U.S. at 185. (citing *Goldberg*, 488 U.S. at 262). Here, the mere threat of real multiple taxation (though not necessarily by identical statutes) may indicate overreaching. *Id.*

As for the specific facts at hand, Mississippi adopted the International Registration Plan (IRP) under the

authority of § 27-19-143 of the Code in 1975. Mississippi Code Annotated § 27-19-143. Generally, under this plan a company such as Gibson Container is required to register its fleet only in its "base jurisdiction." This State is responsible for collecting all "fees" owed by the company. Because the determination regarding what, specifically, these fees are to encompass is left to the individual jurisdiction, any or all applicable taxes may or may not be included in a particular state's computation. However, in each case, the carrier files annual schedules from which the total miles traveled in each state during the previous year may be extrapolated. Based on these figures, the base jurisdiction then collects the monies and remits the appropriate percentage of the funds to the other states through which the trucks travel. The result is apportioned taxes. The difficulty here lies in the way in which Mississippi delineated its fees prior to 1993. Because this State excluded ad valorem taxes from the figure, a carrier registered here was required to pay this tariff *in addition to* the shared sum described above. As might be expected, efforts to avoid payment of this sum led Mississippi's trucking companies to the type of extra-territorial tagging at issue in the instant case. Nevertheless, despite extensive quibbling between these parties, neither the method by which the carriers accomplished this feat nor the decades during which the state tax commission and collectors apparently turned a blind eye to the practice holds much significance now. If the scheme represented an unconstitutional attempt on the part of this state to tax interstate commerce, as I believe it did, we simply cannot hold Gibson Container responsible for the monetary burden it professed to impose.

Article 4, § 112 of the Mississippi Constitution mandates that all property subject to this duty be taxed at its "assessed value." Miss. Const., art. 4, § 112. This figure is simply a function of actual worth as it is calculated by multiplying a designated fraction with the asset's estimated value. For instance, this so-called "assessment ratio" is set at thirty percent of a motor vehicle's true value and is collected in addition and as a prerequisite to the issuance of a road and bridge privilege license. Miss. Const., art. 4, § 112; Miss Code Ann. § 27-35-4(3). *See also* Miss. Code Ann. § 27-51-7. The difficulty with this scheme is that when applied independently, as it was until just a few years ago, it takes no account of an instrumentality's comparable presence within this State or the services provided in association therewith. In other words, there exists no mechanism for apportionment. If this is the case, the scheme surely lacks both internal and external consistency.

In response to this inevitable conclusion, Mr. Mitchell argues that the thirty percent assessment ratio arbitrarily chosen by our legislature cures any defects since approximately fifty percent of the miles traveled by these trucks during the pertinent period of time were actually accumulated in Mississippi. According to his brief, the units were "being taxed at a percentage of value that is less than the percentage of miles actually traveled in Mississippi during the years in question. . . . " While this may be true, it is strictly a coincidence and not a reflection of skilled draftsmanship. Had these trucks traveled only a minuscule number of miles within this State, the result would have been the same since the former statutory scheme failed to take into account this type of variation.

Mr. Mitchell nonetheless urges that we give the tax our approval, likening its application in the present case to the "effective apportionment" found by the United States Supreme Court in *Japan Line, Ltd. v. County of Los Angeles.* The *Japan Line* court, while addressing a foreign Commerce Clause question, "assumed" that an ad valorem tax passed muster under *Complete Auto* because the number of shipping containers physically present and subject to taxation on California's lien date seemed representative of the average found in the jurisdiction. *Japan Line,* 441 U.S. at 451 n. 8. However, since the opinion's primary focus and ultimate outcome rested on issues unique to foreign commerce with which we are unconcerned here, I agree with the majority that any guidance regarding the coincidental apportionment with which we are currently presented is insignificant. *See Id.* at 452-6. Although the Commerce Clause "does not call for a mathematical exactness nor the rigid application of a particular formula," I believe Mississippi's former statutory scheme, as applied to instrumentalities of interstate commerce, is unacceptable. *Northwest Airlines, Inc., v. Minnesota,* 322 U.S. 292, 325 (1944) (Stone, C.J., dissenting). I therefore feel that we should reverse the judgment of the Lee County Chancery Court imposing $167,845.37 in unapportioned taxes.

THOMAS, P.J., JOIN THIS SEPARATE WRITTEN OPINION.

SOUTHWICK, J., DISSENTING:

I agree with Judge Hinkebein's insightful discussion of the constitutional issues. However, since I believe it is

our obligation to interpret statutes in a reasonable manner that would uphold their constitutionality if it is possible to do so, I write separately to discuss such an interpretation.

The starting point is that we are interpreting a statutory scheme that no longer exists. Whatever the interplay might have been prior to July 1, 1993, between the ad valorem taxation statutes, the motor vehicle registration statutes, certain interstate compacts, and the other relevant rules, those relationships have been supplanted by the present version of Mississippi Code sections 27-19-11, 27-51-41 and other statutes.

Vehicles operated in interstate commerce are by definition present in several different States through the course of their use. It is not explicitly argued here that each State in which the vehicles are used may separately assess and collect ad valorem taxes on the full value of the vehicle. Such burdens would discriminate against vehicles in interstate and favor those in intrastate commerce.

The principal Supreme Court authority on these issues dealt with *international* commerce. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 444-445 (1979). That case stated that "we may assume that, if the containers at issue were in purely interstate commerce, *Complete Auto* would apply and be satisfied." *Complete Auto* is a suit that started in Hinds County, Mississippi and gave a four-part requirement for taxation of interstate commerce: 1) tax situs in State, 2) tax is fairly apportioned, 3) does not discriminate between intra- and interstate property, and 4) tax is fairly related to services provided by the taxing

authority (does Hinds County make life better for those it taxes?). *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The apportionment in *Japan Line* was explained in a footnote. The California tax on cargo containers was apportioned because only those containers in California on a specific date each year are taxed, *Japan Line*, 441 U.S. at 445 n.8. There is constant movement between Japan and America, and thus on any given date only a small portion of the "fleet" is in California.

Unlike *Japan Line*, all Thomas Trucking's vehicles are taxed as if they were domiciled in Mississippi regardless of physical location on January 1. There is no constitutional exception permitting 100% ad valorem tax by a "domiciliary" State, as that is the very concept that these Supreme Court cases are addressing. Arguably every instrumentality in interstate commerce has a domiciliary State. *Japan Line* and other precedents are not defining what everyone else can do *in addition* to the 100% tax by the domicile. One State cannot impose an unapportioned tax on property used in interstate commerce unless no other State can properly assess any tax.

The Lee County Tax Collector alleges here that the tax is constitutional because it is assessed only on 30% of the full value of the vehicles. That arises from statute, whereby all motor vehicles are assessed at that percentage. Miss. Code Ann. § 27-35-4(3) (Rev. 1995). This certainly is not an apportionment. It appears that the Tax Collector is not arguing that it is. All motor vehicles, whether interstate or intrastate in their use, are assessed at that percentage. Whatever the assessment percentage, the constitutional problem arises from an interstate vehicle being subject to higher taxes than its intrastate

cousins. They all pay the same taxes based on the same percentage assessment in Mississippi, but Thomas Truck's vehicles are also subject to taxation elsewhere. The Tax Collector makes an argument that the constitutional problem arises only if the interstate vehicles are subject to taxation at their *full value* in more than one jurisdiction, but I find that an improper taking of the "full value" phrase out of context from some opinions. Interstate vehicles assessed at the same percentage of full value as intrastate vehicles means they are subject to multiple and higher taxation in the total number of jurisdictions that have power to tax them. That is the constitutional defect.

Judge Hinkebein has ably dealt with these authorities on the issues arising from a State's participation in such disproportionate taxation and I will not further discuss those principles.

If it is possible "a court should construe statutes so as to render them constitutional . . . after first resolving all doubts in favor of validity." *City of Oxford v. Northeast Mississippi Electric Power Assn.*, 704 So.2d 59 (Miss. 1997), quoting *Londen v. Mississippi Public Service Commn.*, 279 So.2d 636, 640 (Miss. 1973). The construction must not give violence to the words, but must be a reasonable interpretation of the intent of the legislature. *Grace v. Department of Human Services*, 687 So. 2d 1232, 1234 (Miss. 1997). What the majority holds is that if Mississippi is the domiciliary State for the vehicles in question, we can ignore the taxing authority that other States have regarding them. Since I find that the majority's interpretation would make this statute unconstitutional, I discuss what I find to be the reasonable and constitutionally valid interpretation.

The tax obligation arises from this: "[a]ny person required by law to pay a road and bridge privilege tax on any motor vehicle shall also be liable for the ad valorem taxes due on such motor vehicle, unless otherwise specifically exempted herein." Miss. Code Ann. § 27-51-7 (Rev. 1995). Determining the county of domicile of a vehicle does not define the obligation. That only determines where the taxes are paid if they are due. *See also* Miss. Code Ann. § 27-19-57 (Rev. 1995) ("persons required to pay the privilege license prescribed by this article shall register their . . . vehicle and pay such tax in the county in which such vehicles are domiciled. . . . "). If the privilege license must be purchased and the owner acquires one in the wrong county, a penalty is assessed. *Id.*

The road and bridge privilege tax obligation becomes the next element of the analysis. Only if Thomas Trucking was required by law to pay Mississippi's road and bridge privilege tax could it be made to pay Lee County's ad valorem tax. When that tax is paid, the vehicle is issued a license plate or a decal for an existing plate signifying the privilege of operating the vehicle for a year. Miss. Code Ann. § 27-19-11 & 27-19-31 (Rev. 1995). It is here that Thomas Trucking and the county join issue; did Thomas Trucking have to take its vehicles in Mississippi?

One of the statutes discussed by the parties established the amount of the highway privilege tax, but did not define who was to pay it. Its language was only that on "each carrier of property, for each motor vehicle, truck-tractor or road tractor used in the operation of any business as such, there is hereby levied an annual highway privilege tax" in accordance with the fee schedule

that followed. Miss. Code Ann. § 27-19-11 (Supp. 1987), codifying 1987 Miss. Laws ch. 322, § 21.

In fact, the parties have pointed us to no statute that specifically defines which vehicles are to pay the road and bridge privilege tax. To operate on the roads of Mississippi motor vehicles must be tagged somewhere. Vehicles entering the State briefly to take advantage of Mississippi attractions do not pay our tax. Other vehicles whose drivers do not stop at all do not pay our tax. The majority no doubt assumes that such transient vehicles domiciled elsewhere "of course" do not pay the tax, but that any vehicle that arguably is domiciled here but enters other States on a regular or irregular basis has to pay Mississippi's road and bridge tax. Such payment then obligates a payment of the ad valorem tax. However, I find no such rule in the statute. Could the owner of a vehicle that is principally located in Alabama pay the highway and bridge privilege tax in Mississippi and be issued a tag? There is nothing in the statute that prevents it. In our case, the opposite happened. A Mississippi-domiciled vehicle was tagged in Alabama.

What Thomas Trucking needed for its vehicles was a tag or license. By not getting such a tag in Mississippi but instead acquiring one in Alabama, Thomas Trucking argues that it fulfilled its obligations for operating on Alabama, Mississippi and all other highways. If that is true, that is, if Thomas Trucking validly under the statutory scheme as it existed during the relevant period avoided paying the Mississippi road and bridge privilege tax, then it also had no ad valorem tax obligation.

To address whether this was a permissible reading of the statutes that were silent on who was to pay the highway and bridge tax, Thomas Trucking sought to introduce evidence of prior attorney general and tax commission views on the meaning. Such evidence would have been useful and relevant to the trial court. However, not permitting the introduction of a withdrawn 1970 attorney general opinion was not error. The opinion contained a legal argument that the chancellor should have been willing to consider, but the majority here is correct that the opinion itself does not have evidentiary value. Its legal significance would be to insulate a proper official from liability for good faith following of its guidance. Miss. Code Ann. § 7-5-25 (Supp. 1998). That is not a question here, either factually because no reliance by a proper party occurred nor legally because the opinion was withdrawn. Thomas Trucking could and did make the same legal arguments to the chancellor as were contained in the withdrawn opinion letter, and that suffices.

The testimony of Frank McCain, State Tax Commission Revenue Director, would have discussed the history of taxation in this area. This is the agency empowered to interpret and apply the relevant law. Miss. Code Ann. § 27-19-1 (Rev. 1995) ("The State Tax Commission . . . is hereby vested with the sole power . . . of administering and enforcing the terms" of the Motor Vehicle Privilege Tax Act.) I find it to be error not to receive an explanation of how the Commission had interpreted the taxing scheme. The chancellor refused to admit the evidence because he said that the statutes were not ambiguous. When the relevant statutes say nothing explicit about the key issue in the litigation, namely, who has to pay the tax,

then the chancellor should be looking for evidence of meaning from any relevant source.

The proffer that was made through McCain discussed the witness's knowledge of the interpretation of these statutes regarding "the appropriate jurisdiction into which a trucking company would be required to purchase its base plate" or tag. As part of that testimony, McCain mentioned the reciprocal agreements that could be entered between Mississippi and other States pursuant to the "Internationl Registration Plan." *See* Miss. Code Ann. § 27-19-143 (Rev. 1995). McCain testified that Mississippi entered into this plan on November 1, 1975. Under the IRP a trucking company could buy a tag in a State in which it had a telephone, some truck mileage, accessible records, and a person conducting the business. By 1987 McCain and others at the tax commission became aware that trucking companies were using the IRP to permit selecting the most advantageous state in which to purchase a tag. Alabama won out over Mississippi in Thomas Trucking's situation. The bridge and license fee it paid there was apportioned between States based on mileage.

Beginning in 1987 McCain and the commission sought corrective legislation to apportion ad valorem taxes among States based on mileage traveled within each State. What was needed and finally acquired was a statutory scheme that replaced an unapportioned ad valorem tax based on where a vehicle was tagged, to an apportioned scheme based on miles traveled. Miss. Code Ann. § 27-19-11, 27-19-143 & 27-51-41 (Rev. 1995).

McCain testified that a large number of trucking companies did what Thomas Trucking did, and a statutory change was pursued by the tax commission to correct the resulting taxation shortfall to Mississippi. I believe that the previous version of the operative statutes permitted a business such as Thomas Trucking to choose the State in which to be licensed. Since it is the payment of the road and bridge privilege tax that creates the ad valorem tax obligations, proper payment in Alabama under the previous version of the statutes meant that there was no ad valorem tax to pay in Mississippi. Such an approach was not optimal from several viewpoints and has been changed.

In summary, none of the statutes then in existence explicitly required that all vehicles domiciled in Mississippi be tagged in Mississippi. The statutes also required that a vehicle tagged in Mississippi pay an unapportioned ad valorem tax. The reasonable interpretation of these two facts is that there was no requirement that a vehicle licensed in another State also must be licensed here. Such an obligation, by also creating an unapportioned ad valorem obligation, would have been unconstitutional. I find in the silence of the legislature on this point no intent that is being overridden.

For clarity, I will state that I agree with the majority in rejecting several of Thomas Trucking's arguments. The alleged tax amnesty provided that "until July 1993, vehicles which are subject to the provisions of this section and were licensed in another state shall not be subject to any other taxes when registered in this state." Miss. Code Ann. § 27-19-11 (Rev. 1995). I do not read this as forgiveness for past obligations. The question remains whether

Thomas Trucking owned back ad valorem taxes. I think it did not, but if it did this section did not wipe them away.

I also agree that the exercise of discretion by the Lee County tax assessor on the use of the resources of his office cannot be controlled in the manner sought by Thomas Trucking. No injunction should be issued to force the assessor to seek taxes and penalties from other truckers similarly situated. Of course, in my view the tax assessor should not succeed in the suit brought here. In fact, I seriously doubt that the assessor had the right to bring this suit. Since no ad valorem taxes are due unless the road and bridge privilege tax is paid, my initial analysis would be that the tax commission must first seek enforcement of the privilege tax statutes. The commission has authority to bring enforcement actions for failure to comply with tax statutes. Miss. Code Ann. § 27-3-33 (Supp. 1998). For an individual county's tax assessor indirectly to bring the privilege tax enforcement action does not appear to me to comport with the statutory scheme. Since this has not been briefed, I do no more than comment on the question.

I would reverse and render.

MCMILLIN, P.J. AND HERRING, J., JOIN THIS SEPARATE OPINION.

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January 27, 2000

This is to advise you that the Mississippi Supreme court rendered the following decision on the 27th day of January, 2000.

Supreme Court Case # 95-CT-00745-SCT
Trial Court Case # 42286

Thomas Truck Lease, Inc. and Gibson Container, Inc. v. Lee County, Mississippi, By and Through Its Former Tax Collector, J. E. (Bill) Mitchell and His Successor In Office, Charles Dillard.

Motion for Rehearing, denied. Prather, C.J., Banks, Smith and Mills, JJ., would grant.

* *NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS* *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Supreme Court, U.S.
FILED
MAY 30 2000
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No. 99-1722

IN THE

Supreme Court of the United States

THOMAS TRUCK LEASE, INC.
and GIBSON CONTAINER, INC.,

Petitioners,

v.

J. E. (BILL) MITCHELL, Lee County,
Mississippi Tax Collector,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal Commerce Clause requires Lee County, Mississippi, to further apportion ad valorem taxes assessed (under a statutory scheme repealed in 1993) against a fleet of trucks whose only legal tax situs was Lee County, where the fleet was daily fueled, dispatched, garaged and maintained in Lee County, where the fleet traveled approximately one-half of its miles in Mississippi and where the fleet was used daily to transport products manufactured solely in Lee County.

RESPONDENT'S LIST OF PARTIES

Petitioner Gibson Container, the lessee and statutory owner of the fleet, T.Ct. Op. at 3 (Pet. App. at 28),[1] is an Arkansas corporation that manufactures and distributes cardboard boxes, which, during the tax years at issue, had all of its production facilities and administrative offices in Lee County. S. Ct. Op. ¶2 (Pet. App. at 2).[2] Petitioner Thomas Truck is an Alabama corporation with its principal place of business and corporate office in Mississippi. S. Ct. Op. ¶2 (Pet. App. at 2).[3] Respondent Lee County is a political subdivision of the State of Mississippi.

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1. Under Mississippi law, MISS. CODE ANN. § 27-19-3 (1972), Gibson Container, as lessee, is deemed the statutory owner of the fleet. As such, it is the entity statutorily obligated to pay the ad valorem taxes at issue. Thomas Truck's obligation to pay Gibson Container's ad valorem taxes arises under the lease agreement described below.

2. Other than a small administrative office in Arkansas, Gibson Container's sole facility during the tax years at issue was its manufacturing plant in Lee County, Mississippi. T. Tr. at 44-46. Each tractor-truck in the fleet weighed more than 10,000 pounds and was identified by Gibson Container (for purposes of U.S. D.O.T. identification requirements, *see* 49 C.F.R. § 390.21) with a placard stating Gibson Container's principal place of business as Tupelo, (which is in Lee County) Mississippi.

3. Although not strictly pertinent to Gibson Container's obligation to pay ad valorem taxes in Lee County, during the tax years at issue, Thomas Truck's principal corporate office was in Columbus, Mississippi and 95 percent of Thomas Truck's customers were located in Mississippi. T. Tr. at 79-85.

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RESPONDENT'S OBJECTION TO JURISDICTION

Respondent denies that this Court has jurisdiction under the Commerce Clause or under this Court's "dormant" Commerce Clause jurisprudence. This case was correctly decided by the Mississippi Supreme Court upon independently sustainable state law grounds.

RULE 15.2 CORRECTIONS TO PETITIONERS' STATEMENT OF THE CASE

Petitioner's Statement of the Case is factually incorrect and mischaracterizes this case in several respects, the most glaring of which are corrected immediately below:

a. Petitioners have not, contrary to their assertion (Pet. at 2), paid any of the ad valorem taxes at issue.

b. Petitioners' bald statement that Alabama "continues to levy unapportioned ad valorem tax on tractor trucks engaged in interstate commerce" (Pet. at n. 1, *see also* Pet. at 11) disguises the contrived efforts by Petitioners to escape the ad valorem taxes duly assessed by Lee County. Thomas Truck intentionally and wrongfully registered Gibson Container's fleet in Alabama in hopes of escaping its contractual obligation to pay Gibson Container's higher Mississippi ad valorem taxes.

c. Petitioners unfairly characterize the record when they state that "[t]he proof also showed that at least one Gibson Container truck was in each State on virtually every working day of the applicable tax years." Pet. at 9. No lower court made such a finding of fact. Gibson Container's sales manager in fact testified that the tractor-trucks did not follow a fixed route and could

be dispatched to Mississippi one day, Tennessee the next day, Alabama the next day, etc., and that there was "no set pattern at all for where the trucks went from day to day." T. Tr. at 63-65.

RESPONDENT'S STATEMENT OF THE CASE

In 1988 (under a statutory scheme repealed in 1993), Mississippi assessed two types of taxes on trucking companies. First, Mississippi assessed road, bridge and privilege taxes on all trucks (Mississippi-domiciled or not) that were apportioned according to miles traveled in Mississippi. T.Ct. Op. at 4-6 (Pet. App. at 29-31). Second, Mississippi assessed ad valorem taxes on Mississippi-domiciled vehicles in the county in which the owner was located. *Id.*

In this case, Lee County did not seek to collect a use tax or privilege tax from Gibson Container. Instead, it sought to collect ad valorem taxes on the Lee County, Mississippi-domiciled fleet, taxes which are used in Mississippi to pay for benefits such as fire and police protection, public schools and public libraries, benefits enjoyed daily by Gibson Container and its employees during the tax years at issue. T. Tr. at 56-57, 61-65.

The trial court found that the Lee County Tax Collector properly assessed the owner, Gibson Container, for ad valorem taxes on the fleet for the tax years at issue and therefore held that Gibson Container and Thomas Truck (by virtue of its contractual obligation) were jointly and severally liable to Lee County for ad valorem taxes in the amount of $246,078.78. T.Ct. Op. at 3, 8 (Pet. App. at 28, 33). Both the Mississippi Court of Appeals and the Mississippi Supreme Court affirmed.

During the tax years at issue, all fueling and dispatching of the fleet (which was used to daily transport the cardboard boxes

Gibson Container manufactured solely in Lee County) was performed daily at a Lee County facility; all tractor-trucks embarked daily toward their respective destinations from the Lee County facility and returned there each night to be garaged when not in use; all maintenance on the tractor-trucks was performed at the Lee County facility; and, all tractor-trucks (with the exception of two or three) remained garaged in the Lee County facility for the duration of each weekend. T.Ct. Op. at 1, 5 (Pet. App. at 26, 30); T. Tr. at 51-67. In addition, approximately one-half of all miles traveled by the fleet during the tax years at issue were on Mississippi roads. Based upon these findings of fact, the trial court held that the fleet was domiciled in Lee County. T.Ct. Op. at 3 (Pet. App. at 28).

Prior to March 14, 1988, Thomas Truck proposed to lease the fleet to Gibson Container, register the fleet in the State of Mississippi and pay all property and ad valorem taxes in Mississippi. T. Tr. at 60. Thomas Truck's proposal to pay ad valorem taxes on the fleet in Lee County, Mississippi is embodied in the March 14, 1988 lease and each schedule A thereto, under which Thomas Truck specifically agreed "to provide or pay for the state motor vehicle license for the licensed weight shown on schedule A and personal property taxes for each vehicle in the state of domicile. . . ." Record at 400 (Lease at ¶5A). The agreed domicile for each vehicle in the fleet, as set forth on each schedule A to the lease, is Tupelo, (Lee County) Mississippi. Record at 404-407 (representative samples of Schedule A to Lease).

Notwithstanding Gibson Container's statutory obligation to pay ad valorem taxes in Lee County and Thomas Truck's agreement to pay the Lee County ad valorem taxes on Gibson Container's behalf, Thomas Truck intentionally and wrongfully registered the fleet in the State of Alabama and paid taxes there.

The trial court rejected Thomas Truck's intentional efforts to defeat Gibson Container's statutory obligation to pay the higher Mississippi ad valorem taxes, holding that Thomas "wrongfully registered the tractor-truck units in the state of Alabama." T.Ct. Op. at 7 (Pet. App. at 32).[4]

REASONS FOR DENYING THE WRIT

The Petition should be denied because it seeks to overturn findings of fact and conclusions of law made by a Mississippi trial court based upon a Mississippi statutory scheme that no longer exists. Even Petitioners admit that "[t]he scenario presented by this case will not be repeated in Mississippi. . . ." Pet. at 11.

Moreover, as the Mississippi Supreme Court recognized, the ad valorem taxes at issue neither violate the federal Commerce Clause, nor trigger review under this Court's "dormant" Commerce Clause jurisprudence. Under the now repealed Mississippi statutory scheme at issue, "[o]ut-of-state or 'foreign registered' vehicles only pa[id] their apportioned share of road, bridge, use and privilege taxes." T.Ct. Op. at 5 (Pet. App. at 30). Owners of Mississippi-domiciled vehicles like Gibson Container, however, also paid ad valorem taxes on their vehicles in the county in which they were located. *Id.*

By law, ad valorem taxes are paid at the legal situs of the property, not at the lowest priced taxing jurisdiction chosen by the taxpayer, or in this case by one contractually obligated to pay taxes on the taxpayer's behalf. The U.S. Constitution does

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4. Petitioners failed to prove their allegations that Mississippi was party to a version of an International Registration Plan ("IRP") that permitted them to register the fleet in Alabama. T.Ct. Op. at 7-8 (Pet. App. at 32-33).

not empower taxpayers to unqualifiedly pick and choose the state in which they want to pay ad valorem taxes. Yet, Petitioners attempted to do just that.

For example, the fleet was by law and by contract domiciled in Lee County, Mississippi. Gibson Container, the tax obligor, had no office or permanent presence in the State of Alabama or in any other state (except for a small office in Arkansas, with which the fleet had no connection). The only evidence of any presence in Alabama by Gibson Container was gross fleet mileage accrued during the transient daytime presence of an unspecified number of trucks on unspecified days traversing Alabama highways on unspecified routes to deliver an unspecified number of its products (all of which were manufactured in Lee County) to unspecified destinations, some in Alabama, some not. Thus, because Petitioners failed to carry their burden of proving that the fleet, or any definable portion thereof, obtained a legal situs anywhere other than Mississippi so as to displace Lee County's power to assess the ad valorem taxes at issue, the Mississippi Supreme Court rightly concluded that this case is controlled by Mississippi law, rather than by the federal Commerce Clause.[5]

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5. Notwithstanding Gibson Container's lack of legal situs in Alabama, Thomas Truck (whose principal corporate office was in Mississippi and 95 percent of whose customers were in Mississippi) sought to defeat Gibson Container's statutory obligation to pay the higher Mississippi ad valorem taxes by contriving to artificially convert the Mississippi-domiciled fleet into a foreign registered fleet by wrongfully registering the fleet and paying lower taxes in the State of Alabama. The trial court correctly rejected Thomas Truck's contrived efforts. While Thomas Truck may well be disappointed that it was not able to escape the taxes that it is contractually obligated to pay, any additional tax it must pay is the result of its voluntary payment of taxes in the State of Alabama as part of a calculated and wrongful effort to frustrate the legitimate taxing power of the State of Mississippi, not the result of a constitutionally infirm tax levied by Lee County.

Furthermore, and for the same reason, the Mississippi Supreme Court correctly held that even if the Commerce Clause applied, the ad valorem taxes are internally consistent. And, just as Petitioners did not argue below that the ad valorem taxes levied by Lee County are unfairly apportioned when viewed from an economic perspective, they likewise fail to do so here. Instead, Petitioners merely continue a strain of their form-over-substance argument from below that absent a mathematically precise and mechanistically applied formula (driven strictly by gross fleet highway mileage, ignoring the fact that such highway taxes are already apportioned and ignoring the continuous benefits and protections afforded by Lee County that form the basis for ad valorem taxation), Lee County's ad valorem assessment cannot survive constitutional muster. Petitioners' reasoning is nothing more than a thin gloss on the formalism embraced by the rejected *Spector* rule, which was overruled by *Complete Auto Transit*'s functional mandate to decide each case based upon the economic realities. As demonstrated below, when viewed from a practical economic perspective, the Mississippi Supreme Court was correct in its conclusion that the ad valorem taxes at issue are externally consistent, and, therefore fairly apportioned.

Finally, Petitioners ask this Court to revisit half-a-century old decisions without identifying any particular disagreements in the lower courts as to the meaning or application of those decisions. Indeed, as demonstrated below, the decision reached by the Mississippi Supreme Court in this case is entirely consistent with a line of lower court decisions following this Court's precedents.

For these reasons, Petitioners' request that this Court take this case to decide the constitutionality of a statute of no general application, repealed by Mississippi seven years ago, should be denied.

I. Neither the Commerce Clause, this Court's "Dormant" Commerce Clause Jurisprudence, Nor Thomas Truck's Contrived Attempt to Create an Artificial Legal Situs (by Wrongfully Registering the Gibson Container Fleet in Alabama) Defeat Gibson Container's Statutory Obligation to Pay the Ad Valorem Taxes Assessed by Lee County, Mississippi, the Fleet's Only Tax Situs, Nor Do They Shield Thomas Truck From its Contractual Obligation to Pay the Ad Valorem Taxes on Gibson Container's Behalf.

Both federal and state law hold that ad valorem taxes can be imposed by states in which personal property has acquired a legal situs by maintaining a permanent presence during the tax year only. Petitioners' vague and general proof does not demonstrate that the fleet (or a defined portion thereof) acquired a legal situs by maintaining a permanent presence during the tax year in Alabama, or in any other state. Lee County, as the fleet's domicile and only tax situs, thus retained its power to levy ad valorem taxes on the entire fleet.

1. Because Petitioners Failed to Prove that the Fleet Acquired a Taxable Situs Elsewhere, the Mississippi Supreme Court Correctly Concluded that Petitioners Have No Basis for a Commerce Clause Challenge to the Ad Valorem Taxes Levied by Lee County.

Unless personal property domiciled in a state has acquired "a *permanent* location, i.e., a taxable situs, elsewhere[, only the domiciliary state may levy an ad valorem tax.]" *Compare Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 602 (1954) (emphasis supplied, internal punctuation omitted) (citing with approval this Court's

longstanding principle as affirmed in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944)); *with Northwest Airlines*, 322 U.S. at 297-98 ("no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is *permanently* situated in a State other than the domiciliary State.") (emphasis supplied); *Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania*, 370 U.S. 607, 611-12 (1962) ("[T]he State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere.' ") (quoted citation omitted) (but reversing in part because taxpayer proved that 158 units acquired a tax situs elsewhere).

To prove another tax situs under *Northwest Airlines* and *Braniff Airways*, it is not sufficient, as Petitioners suggest, to simply prove fleet gross mileage traveled through other states during the tax year, but rather, the taxpayer must prove that the fleet (or a defined portion thereof) maintained a *definable continuous and permanent presence* in another state that provided continuous protection and benefits throughout the tax year. *Compare Northwest Airlines*, 322 U.S. at 299 (fact that "12% to 64% of the property was shown to have been used outside the [domiciliary state] during the tax year" does not deprive the domiciliary state of its power to tax all such property, absent a showing that the property was "*permanently*, that is, for the whole year", situated outside the domiciliary state) (citation omitted) (emphasis supplied) (holding that Minnesota had the power to assess an ad valorem tax on Northwest's entire fleet of aircraft) *with Braniff Airways*, 347 U.S. at 592, 594, 599, 602 (upholding Nebraska's levy of an apportioned ad valorem tax against a due process challenge where specific proof, including Braniff's rental of a depot space and hiring of other services in Nebraska, demonstrated that a defined portion of Braniff's fleet acquired an actual situs in Nebraska).

Moreover, neither mere absence from the domiciliary state nor voluntary payment of ad valorem taxes in another state are sufficient to establish another tax situs or to supplant a domiciliary state's power to levy ad valorem taxes. *See Ryder Truck Rental v. County of Chesterfield*, 449 S.E.2d 813, 816 (Va. 1994) ("Mere absence from one taxing jurisdiction is not sufficient to establish a tax situs in another.") (citation omitted) (rejecting taxpayer's contention that ad valorem taxes assessed against fleet of rental trucks based in a Virginia county should be apportioned simply because fleet traveled approximately 50 percent (or more) of its gross mileage in other states); *Bi Go Markets v. Morton*, 843 S.W.2d 916, 917, 919-20 (Mo. 1992) (rejecting taxpayer's contention that the taxing state was required to apportion an ad valorem tax simply because the taxpayer registered and paid an annual license fee for its fleet of aircraft in another state in which its aircraft landed several times); *see also Peabody Coal Co. v. State Tax Comm'n*, 731 S.W.2d 837, 838-39 (Mo. 1987) *appeal dismissed for want of jurisdiction and cert. denied*, 484 U.S. 960 (1987) (upholding ad valorem taxes assessed against taxpayer's fleet of aircraft where taxpayer's principal place of business was in Missouri and rejecting taxpayer's argument that taxpayer established another state as a tax situs in which its fleet made 31.8 percent of its landings). To establish another tax situs, it is simply not enough to prove gross mileage and adduce general testimony, as Petitioners have, showing that an unspecified portion of the fleet was not in the State of Mississippi during unspecified periods. *Central Railroad Co. of Pennsylvania*, 370 U.S. at 611.

Instead, a taxpayer has the burden of proving by specific evidence "that some portion of its total assets are beyond the reach of the taxing power of its domicile [because] . . . the same property may be similarly taxed in another jurisdiction." *Central Railroad Co. of Pennsylvania*, 370 U.S. at 613 (citation

omitted); *see also Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 175-176 (1983) (quoting *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537-38 (1951)) ("a taxpayer claiming immunity from a tax has the burden of establishing his exemption"); *Miss. State Tax Comm'n v. Medical Devices*, 624 So. 2d 987, 990-91 (Miss. 1993). Thus, here, to supplant the power of Lee County (as the fleet's domicile and only tax situs) to levy the ad valorem taxes at issue, Petitioners had the burden of proving by specific evidence (just as the taxpayers in *Northwest Airlines* and other cases cited herein) that the fleet (or a defined portion thereof) acquired another tax situs by maintaining a definable continuous and permanent presence in another state. Petitioners failed to carry their burden of proof.

Similarly, Petitioners fail to cite a single authority supporting their argument that a domiciliary state must proportionately reduce ad valorem taxes levied on a fleet of trucks with their actual situs in the domiciliary state absent specific evidence that a defined portion of the fleet maintained a definable continuous and permanent presence during the tax year in another state that provided continuous protection and benefits throughout the tax year so as to supplant the taxing power of the domiciliary state.

On the other hand, there are numerous authorities that have considered and rejected arguments such as Petitioners' for the same reasons that the Petitioners' arguments were rejected by the Mississippi Supreme Court. For example, the fleet in *Northwest Airlines* traveled more than 80 percent of its mileage outside the domiciliary state, Minnesota. *Northwest Airlines*, 322 U.S. at 293. Stated another way, less than 20 percent of the total mileage of the fleet (as opposed to 50 percent of the total mileage in the instant case) was in the domiciliary state.

Yet, this Court upheld the domiciliary state's assessment of ad valorem taxes on the entire fleet because the taxpayer failed to show that a "defined part of the [taxed property] ha[d] acquired a permanent location, i.e., a taxing situs, elsewhere." *Id.* at 295.

Additionally, in *Northwest Airlines*, although all rebuilding and overhauling was done in the domiciliary state, maintenance bases were maintained outside the domiciliary state. *Northwest Airlines*, 322 U.S. at 293. Here, the fleet was always maintained, dispatched, fueled, garaged and stored in Lee County (including all weekends). Thus, as in *Northwest Airlines*, none of the Gibson Container fleet was permanently located outside the domiciliary state (here, Mississippi), and, therefore, it could not be (except through Thomas Truck's intentional and wrongful actions) subjected to double ad valorem taxation.[6] *See id.* at 293-96. To state it another way, the ad valorem taxes challenged by Petitioners were assessed against property (the fleet) within the State of Mississippi that received no permanent protection from any other state during the tax years at issue. *Accord Northwest Airlines*, 322 U.S. at 294-96.

Similarly, in *Billings Transfer Corp. v. County of Davidson*, 170 S.E.2d 873 (N.C. 1969), the North Carolina Supreme Court rejected a taxpayer's challenge to ad valorem taxes on facts analogous to the facts upon which Petitioners base their challenge. Like Petitioners, Billings Transfer contended that

6. Thomas Truck's wrongful registration of Gibson Container's fleet and payment of taxes in Alabama does not affect Lee County's power to levy ad valorem taxes. *Northwest Airlines*, 332 U.S. at 295; *Bi Go Markets*, 843 S.W. 2d at 917, 920. To hold otherwise would result in taxpayers arbitrarily selecting a place for taxation of their vehicle in defiance of the law of their domicile, in disregard of the principle of actual situs, thereby giving taxpayers the absurd and unlimited power to arbitrarily frustrate the taxing laws of the state where they are rightfully subject to taxation.

the domiciliary state was required to proportionately reduce ad valorem taxes levied against its fleet based upon gross fleet mileage traveled in other states. *Billings Transfer*, 170 S.E.2d at 876, ¶8.

The issue in *Billings Transfer* was whether the fleet (or a defined portion thereof) acquired another tax situs thereby supplanting the domiciliary's power to levy ad valorem taxes. *Billings Transfer*, 170 S.E.2d at 878. Similar to Gibson Container's relationship to Lee County, Billings Transfer's fleet was domiciled in Davidson County, North Carolina, *id.* at 875, ¶1; used in interstate commerce (hauling furniture, textiles and plywood from North Carolina to seven states), *id.* at 875, ¶2; and maintained in and dispatched from Davidson County. *Billings Transfer*, 170 S.E.2d at 875, ¶3. At trial, Billings Transfer proved gross mileage traveled by its fleet on a state-by-state basis (only 35.88 percent of the miles were traveled in North Carolina). *Id.* at 875-76, ¶¶6-8. Billings Transfer failed (as have Petitioners), however, to carry its burden of proving the specific mileage, or proportion of gross fleet mileage, traveled by any single tractor or tractor-trailer unit in each state. *Billings Transfer*, 170 S.E.2d at 875-76, ¶7.

Following an extensive review of this Court's precedents addressing ad valorem taxation of personal property by domiciliary states, *id.* at 878-83, the North Carolina Supreme Court reasoned that the taxpayer's burden of proving "[c]ontinuous presence throughout the tax year is not shown by evidence which 'merely proves that some determinable fraction of its property is absent from the State for a part of the tax year.' " *Billings Transfer*, 170 S.E.2d at 884-85 (quoted case omitted). Accordingly, the Court held that Billing Transfer's evidence of two general routes and gross fleet state-by-state mileage (as opposed to miles traveled by each truck)

was insufficient to establish a tax situs in another state. *Id.* at 885. The *Billings Transfer* Court further held that because it was "apparent that the state of domicile continued at all times to afford all of the plaintiff's property . . . opportunities, benefits, and protection which . . . were [not] afforded by nondomiciliary jurisdictions *throughout* either of the tax years in question," Billings Transfer's entire fleet was subject to ad valorem taxation in North Carolina. *Billings Transfer*, 170 S.E.2d at 885 (emphasis supplied).

Here, it is likewise apparent that the State of Mississippi "continued at all times to afford all of the [Petitioners' fleet] opportunities, benefits, and protection which . . . were [not] afforded by nondomiciliary jurisdictions *throughout* either of the tax years in question." *Id.* For example, although Gibson Container presented evidence that approximately one-half of the gross fleet mileage accrued on other states' roads, Gibson Container did not prove that any specific tractor-truck or number of tractor-trucks gained a permanent presence in the State of Alabama or in any other state during the tax years at issue. Indeed, Gibson Container's sales manager testified that the tractor-trucks did not follow a fixed route and could be dispatched to Mississippi one day, Tennessee the next day, Alabama the next day, etc., and that there was "no set pattern at all for where the trucks went from day to day." T. Tr. at 63-65.

Gibson Container's proof of gross mileage, transient daytime presence of an unspecified number of trucks on unspecified days traversing Alabama highways on unspecified routes to deliver an unspecified number of its products (all of which were manufactured in Lee County, Mississippi) to unspecified destinations, some in Alabama, some not, is insufficient to establish a taxing situs in Alabama. *See Ryder Truck Rental*, 449 S.E.2d at 816 (proof that Ryder's truck fleet

traveled more than 50 percent of its mileage outside taxing jurisdiction not sufficient to establish tax situs where taxpayer failed to present proof of significant business transactions, cargo loading or unloading, vehicle storage, leasing activities, or other significant activities outside the domiciliary state); *Billings Transfer*, 170 S.E.2d at 876, 885 (proof that tractor-truck fleet traveled approximately 65 percent of its gross mileage outside domiciliary state not sufficient to establish tax situs elsewhere); *accord Central Railroad Co. of Pennsylvania*, 370 U.S. at 616-17 ("To accept the proposition that a mere general showing of continuous use of movable property outside the domiciliary State is sufficient to exclude the taxing power of that State with respect to it, would surely result in an unsound rule. . . .").

Furthermore, Thomas Truck's hopes that its intentional and wrongful registration of Gibson Container's fleet in Alabama and payment of taxes there would defeat Lee County's power to assess ad valorem taxes on the fleet, which was undisputedly domiciled and daily garaged, fueled, maintained in and dispatched from Lee County, Mississippi, the fleet's only tax situs, are misplaced. "The fact that [a taxpayer] pa[ys] personal property taxes . . . upon 'some proportion of [the] full value' of its . . . fleet in some other States does not abridge the power of taxation of [the domiciliary State.]" *Northwest Airlines*, 322 U.S. at 295; *see Bi Go Markets*, 843 S.W. 2d at 917, 920 (taxpayer's registration and payment of taxes in another state did not affect taxing jurisdiction's ability to levy ad valorem tax on entire fleet where taxpayer failed to prove another tax situs).

Finally, Petitioners' reliance on *Braniff Airways* is similarly misplaced. Unlike this case where Petitioners merely presented evidence of gross fleet mileage and general testimony that an unspecified portion of the fleet was outside the domiciliary state

during unspecified periods, in *Braniff Airways* Nebraska proved that a specific portion of the property of the nondomiciliary taxpayer maintained a continuous and permanent presence in Nebraska by specific evidence, including the fact that Braniff rented depot space and hired other services in Nebraska.[7] Thus, *Braniff Airways* is distinguishable from the instant case based upon the same fatal flaw found *Northwest Airlines* and its progeny, i.e., failure to prove that the fleet "acquired a *permanent* location, i.e., a taxable situs, elsewhere." *Braniff Airways*, 347 U.S. at 602 (emphasis supplied).

Thus, because Petitioners failed to prove that the fleet acquired another tax situs, no state other than Mississippi was entitled to levy an ad valorem tax on the fleet. Consequently, Petitioners have no basis for a Commerce Clause challenge to Lee County's assessment of ad valorem taxes because those taxes cannot be repeated in substance or form by other states. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938). Hence, the Mississippi Supreme Court was correct in concluding that "[t]he present case is strictly one of Mississippi statutory application and does not in any way encroach upon the rights guaranteed by the Commerce Clause." S. Ct. Op. at ¶20 (Pet. App. at 11-12).

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7. *Compare Norfolk and Western Railway v. Missouri State Tax Comm'n*, 390 U.S. 317, 327-30 (1968) (holding tax unconstitutional where taxpayer *proved* that only 2.71% of its rolling stock was usually employed in the taxing state, but taxing state levied an assessment on 8.2824% of the taxpayer's rolling stock, an assessment 305% higher than the *proof* demonstrated it was entitled to tax).

2. The Mississippi Supreme Court Did Not Misapply the Internal and External Consistency Tests of *Complete Auto Transit.*

Petitioners' arguments that the Mississippi Supreme Court misapplied the fourth prong of the dormant Commerce Clause test announced in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) are incorrect and based upon meaningless distinctions and erroneous logic. For example, Petitioners argue that the Mississippi Supreme Court committed an error of constitutional proportions when it "incorrectly paraphrase[d]" the internal consistency test by using the word "law" instead of the word "tax," when considering the internal consistency of the ad valorem taxes. Pet. at 6-7. Unless Petitioners can point to a "tax" that can be imposed without an underlying "law," Petitioners' argument is based upon a completely meaningless distinction.

Internal consistency simply means that a tax (read "law imposing a tax") is structured so that if an identical tax were imposed in every jurisdiction, multiple taxation would not occur. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (tax imposed upon interstate telephone calls charged to an in-state service address internally consistent because only one state would tax each interstate call); *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185 (1995) (tax imposed upon ticket sales for interstate travel originating in-state internally consistent because only one state would tax each sale). As explained above, the ad valorem taxes at issue (not the highway taxes or other taxes that were apportioned under Mississippi law), are not levied based upon highway miles, but rather upon legal tax situs, which turns on permanent presence in the taxing jurisdiction.

Because Petitioners failed to prove that the fleet acquired any legal situs other than Lee County for the tax years at issue, the Mississippi Supreme Court correctly reasoned (using the language of domicile) that if states having identical laws imposed an identical ad valorem tax on property domiciled in the state, multiple taxation would not occur on these facts because no state except the State of Mississippi could legally impose an ad valorem tax. *See id.*; *Goldberg*, 488 U.S. at 261. Consequently, the Mississippi Supreme Court correctly held that the ad valorem taxes are internally consistent.[8]

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8. Moreover, Petitioners failed to prove that any defined portion of the fleet was not present in Lee County on any given day. *See* T.Ct. Op. at 1 (Pet. App. at 26) (Generally, all of the fleet was in the Lee County facility by the end of each day); T.Ct. Op. at 2 (Pet. App. at 27) ("[N]one of the vehicles in question were ever stored, fueled or maintained [in Alabama]."). Based upon this fact alone and the Court's reasoning in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), Lee County's assessment of ad valorem taxes on the entire fleet "roughly approximates" the fleet's actual presence in Lee County. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 445 n.8 (California's assessment of ad valorem taxes on the number of shipping containers found in the state on March 1 of each year was fair apportionment because it "roughly" approximated the containers' average presence in California). *Compare Kenai Peninsula Borough v. Arndt*, 958 P.2d 1101, 1103-05 (Alaska 1998) (presence of vessel on assessment date fixes its tax status for the full year, Commerce Clause does not require apportionment for post-assessment changes); *see also Commonwealth Edison v. Montana*, 453 U.S. 609, 615 (1981) (the goal of this Court's jurisprudence has been to "establish a consistent and rational method of inquiry focusing on the practical effect of a challenged tax") (internal punctuation modified) (quoted and cited cases omitted) (rejecting a Commerce Clause challenge to a flat 30% Montana severance tax on coal); *see also Container Corp.*, 463 U.S. at 169-170 ("The Constitution does not invalidate an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State.") (internal punctuation modified) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978)).

Petitioners also objected to the Mississippi Supreme Court's application of the external consistency test, but fail to apply the test themselves. As a guiding principle, this Court has explained that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61 (rejecting Commerce Clause challenge to an Illinois excise tax). As correctly explained by the Mississippi Supreme Court, a tax is externally consistent if it reasonably reflects the in-state component of the activity being taxed. *Id.* at 262 (citation omitted). The external consistency test thus looks solely to the practical economic realities of a tax. *Goldberg*, 488 U.S. at 262.

Here, Petitioners do not argue that the ad valorem taxes are unfairly apportioned when viewed from an economic perspective. Instead, they merely continue the form-over-substance argument they made below, albeit now in a somewhat more convoluted form. For example, Petitioners' argument that the taxes at issue are not externally consistent because they are being assessed at the same ad valorem rate that Mississippi trucks that travel all of their miles on Mississippi highways are assessed is a non sequitur.

Petitioners' faulty logic assumes a unitary business tax or other overlapping singular tax system, rather than the dual system of (a) road, bridge and privilege taxes and (b) ad valorem taxes at issue. For example, under the statutory scheme in effect during the tax years at issue, Mississippi assessed road, bridge and privilege taxes on all trucks (Mississippi-domiciled or not) which were apportioned according to the miles traveled in Mississippi, thereby accommodating other states' interests in taxing tractor-trucks using their highways.

Ad valorem taxes, on the other hand, were assessed against Mississippi-domiciled vehicles only, such as Gibson Container's fleet. The ad valorem taxes at issue are based upon actual situs and are used in Mississippi to pay for fire and police protection, public schools and public libraries, benefits provided by Lee County to Gibson Container and its employees on a continual and permanent daily basis during the tax years at issue. Thus, the taxes at issue are not based upon highway mileage, but rather upon the taxpayer's permanent presence in the State of Mississippi.

Here, although an unspecified number of trucks departed from Lee County to transport goods to other states on a daily basis, each truck returned, along with Gibson Container's employees, daily to remain overnight in Lee County. Similarly, Gibson Container employees (and their families) continued to enjoy the benefits provided by Lee County on a daily basis. Petitioners failed to prove that any other state provided the types of benefits provided by Lee County on a daily, continual and permanent basis (as opposed to merely providing highways over which an unspecified portion of the fleet traveled during the day, for which these states received their share of apportioned highway taxes).

Thomas Truck's attempt to create an artificial situs by wrongfully registering the Gibson Container fleet in Alabama (where Gibson Container had no permanent presence) does not change the analysis. Petitioners failed to prove that Alabama provided any of the benefits provided by Lee County on a daily, continual and permanent basis. The benefits provided by Alabama (and by any other state) were those daytime benefits provided in connection with highway travel, paid for by road, bridge and privilege taxes, which were apportioned according to the miles traveled in each state.

Thus, the critical flaw in Petitioners' reasoning is that they assume (without authority) that because the fleet was used in interstate commerce, Lee County must, as a matter of federal constitutional law, reduce their ad valorem taxes by the percentage of miles the fleet collectively traveled on other states' highways without taking into account the continuous and permanent protection and benefits provided by Lee County (which were provided by no other state on a continuous and permanent basis during the tax years at issue) and without taking into account the apportionment of taxes already provided for in connection with highway travel. Such formalistic reasoning cannot withstand scrutiny under *Complete Auto*'s functional mandate, the central purpose of which is to ensure that each state taxes only its fair share of an interstate transaction. *See Goldberg*, 488 U.S. at 260-61. *Complete Auto*'s assessment requires evaluation of the practical economic realities and effects, coincidental or not, of a tax. *See Complete Auto*, 430 U.S. at 279. "Practical rather than logical distinctions must be sought." *Western Live Stock*, 303 U.S. at 259.

Here, Petitioners' argument that Lee County, Mississippi's 30 percent ad valorem assessment on the fleet, which traveled approximately one-half of its miles during the tax years at issue (1,738,421 miles in one year alone) on Mississippi roads; which was garaged on all weekends in Lee County, Mississippi; which returned daily after each trip to Lee County, Mississippi; which was fueled, dispatched and maintained in Lee County, Mississippi; which was domiciled, by law and by contract, in Lee County, Mississippi; which was used daily to transport products, 100 percent of which were manufactured in Lee County, Mississippi, is not fair apportionment from a practical economic perspective does not bear scrutiny. On a daily basis, Gibson Container and its employees enjoyed the benefits paid for in large part by the ad valorem taxes assessed, but not yet

collected from Petitioners by Lee County. Coincidental or not, because the ad valorem taxes assessed by Lee County reasonably reflect the in-state component of the activity being taxed, they are externally consistent. This Court's "dormant" Commerce Clause jurisprudence requires nothing more.[9]

3. This Case Does Not Present a Question Justifying Certiorari Review.

Notwithstanding their hyperbole, even Petitioners' admit that "[t]he scenario presented by this case will not be repeated in Mississippi. . . ." Pet. at 11. Petitioners' statements regarding the IRP and implicit allegations that Alabama and other states levy unconstitutional taxes (Pet. at 10-12) are unsupported by

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9. Even if one ignored the lack of specific evidence and accepted all of Petitioners' arguments at face value, one could logically assume that the fleet's actual presence in the State of Mississippi was much higher than the gross mileage data suggests. For example, the gross mileage data suggests that the fleet was in the State of Mississippi at least 50% of the year, or 182.5 days. To this one must add the fact that the fleet returned to Lee County daily after each trip and remained garaged in Lee County on weekends, which results in, at a minimum, another 104 days (52 weeks X 2 weekend days), which would logically result in the fleet's continual presence in Mississippi for a minimum of 286.5 days or 78.49% of the year. To this one must also add the time each tractor-truck was fueled and maintained in Lee County. While these logical assumptions demonstrate the incorrect and superficial reasoning employed by Petitioners and the distortions of fact their arguments assume, this Court does not need to rely upon assumptions to reject the Petition. Taxpayers like Petitioners who claim an exemption from taxation have the burden of proving that exemption by specific evidence, not broad generalities, which in this case required Petitioners to prove that the entire fleet or a specific defined portion thereof acquired another tax situs. *See infra* pp. 8-16. Thomas Truck's wrongful registration and payment of taxes in Alabama does not change the fact that Petitioners failed to carry their burden of proof. *Id.*

authority and are in fact contradicted by Petitioners' own efforts to avoid Mississippi's then higher ad valorem taxes by wrongfully registering the fleet in Alabama and paying lower taxes there. Petitioners' request that this Court revisit half-a-century old decisions without identifying any particular disagreements in lower court decisions, which are entirely consistent with the Mississippi Supreme Court's decision in this case, to decide the constitutionality of a statute of no general application, repealed by Mississippi seven years ago, is not a request worthy of certiorari review.

CONCLUSION

Petitioners failed to carry their burden of proving that Gibson Container's fleet (or a defined portion thereof) acquired another tax situs during the tax years at issue. Accordingly, the ad valorem taxes levied by Lee County (the fleet's domicile and only tax situs) do not violate the Commerce Clause, nor trigger review under this Court's "dormant" Commerce Clause jurisprudence, because the ad valorem taxes cannot be assessed elsewhere.

Moreover, even if this case triggered constitutional review, the ad valorem taxes here were, as a practical economic reality, fairly apportioned. Furthermore, neither the Commerce Clause nor this Court's "dormant" Commerce Clause jurisprudence give Thomas Truck license to frustrate Lee County's power to levy ad valorem taxes on the Mississippi-domiciled fleet by wrongfully registering Gibson Container's fleet in Alabama and paying taxes there. The artifice employed by Thomas Truck was correctly rejected by the lower courts and should be likewise rejected by this Court.

Finally, this is neither a constitutional case nor a case worthy of certiorari review. It is simply a case of a taxpayer disappointed that its arbitrary efforts to shop for the lowest priced taxing jurisdiction were unsuccessful. For these reasons, the Petition should be denied.

Respectfully submitted,

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